In the

Supreme Court of The United States

October Term, 1979

No. 79-7

G. PATRICK MORRIS, JOAN E. ROTH, ELISE L. NEELEY, LYLE D. ROTH, VERA M. BALTZOR (formerly Vera M. Noble), CHARLENE S. BALTZOR, GEORGE R. BALTZOR, JUANITA M. MORRIS, NELLIE MAE MORRIS, MILO AXELSEN, PEGGY M. AXELSEN, and FARM DEVELOPMENT CORPORATION, an Idaho Corporation,

Petitioners,

v.

UNITED STATES OF AMERICA and CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorai issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered herein on November 16, 1978, as amended on April 9, 1979.

OPINIONS BELOW

The Findings, Conclusions and Order of the United States District Court for the District of Idaho, entered December 17, 1976, affirming, in part, and reversing, in part, the decision of the Interior Board of Land Appeals dated April 7, 1975, and the Judgment entered by the District Court on December 20, 1976, are set out in Appendix C., pp. C-1 through C-18, infra. The Findings, Conclusions and Order, and the Judgment, are not reported. The Opinion of the United States Court of Appeals for the Ninth Circuit, filed November 16, 1978, and the Order of the Court of Appeals filed April 9, 1979, are set out in Appendix D, pp. D-1 through D-11, infra. The Opinion of the Court of Appeals, as amended, is reported at 593 F. 2d 851.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was made and entered on November 16, 1978. Timely Petition for Rehearing was filed by these Petitioners. The Order denying the Petition for Rehearing and rejecting the Suggestion for Rehearing en Banc was made and entered April 9, 1979. This Court has jurisdiction to review the Judgment herein by writ of certiorari pursuant to 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. Do a mortgage and a sublease (or a lease) constitute the holding of the lands in a desert land entry within the meaning of 43 USC § 329?

2. Do a mortgage and a sublease (or a lease) constitute the assignment of a desert land entry within the meaning of 43 USC § 324?

3. Does the holding by a single entity, by assignment or otherwise, of more than 320 acres of desert entry land, warrant or require forfeiture of all land thus held, and all moneys paid for that land, where the transactions were voluntarily submitted to the Bureau of Land Management nearly 22 months before the entries were challenged?

4. Can the administrative decision cancelling the desert land entries be upheld, on judicial review, on a finding by the District Court and by the Court of Appeals that the entries had been assigned, where the Interior Board of Land Appeals made no such finding and did not reverse the Administrative Law Judge's finding that the entries had not been assigned?

5. Did the Interior Board of Land Appeals abuse its discretion or exceed its powers and authority by cancelling the desert land entries on the basis of a new and different interpretation of 43 USC § 329 adopted by the Secretary of the Interior 22 months or more after the entrymen made final proof and final payment for the land?

6. Does the Secretary of the Interior's failure to publish a regulation stating a new interpretation of 43

USC § 329 preclude the Interior Board of Land Appeals from applying that interpretation to these desert land entries?

7. Is the Interior Board of Land Appeals' finding that the Bureau of Land Management was not aware that the entrymen intended to lease their entries to a single farming entity supported by substantial evidence?

8. Is the Government estopped from applying its new interpretation of 43 USC § 329 to these desert land entries because it allowed the entries with knowledge of the mortgages and that the entrymen intended to lease to a single entity, failed to assert the new interpretation before contesting the entries, meanwhile permitting Sailor Creek to receive whatever benefits were available to it under the sublease, with no comment or indication that the transactions violated 43 USC § 329, and issued a contrary interpretation in August, 1964, less than a month after copies of the leases and sublease had been furnished voluntarily as requested?

9. Did the IBLA act arbitrarily and capriciously or abuse its discretion or exceed its powers and authority by failing to observe and follow procedure and policy established by Department of the Interior regulations and decisions to the effect that desert land entries are controlled by the interpretations in effect when they are initiated and that excess holdings resulting from transactions entered into in good faith and voluntarily made known to the Bureau of Land Management are regarded as ineffective and as leaving all rights in the entryman?

10. Did the entrymen have such vested interests upon filing their applications and payment of the downpayment of twenty-five cents per acre as would preclude the Department of the Interior from imposing limitations, requirements or procedures not stated in regulations or decisions in effect when the applications were filed?

11. Did the right to patent vest in the entrymen upon making final proof and final payment under 43 USC § 329, so as to preclude the Department of the Interior from thereafter cancelling the entries on the basis of limitations, requirements or procedures not stated in regulations or decisions which were in effect when final proof and final payment were made?

12. Did the Court of Appeals improperly limit the scope of review to the determination of whether the Secretary's (IBLA's) decision is arbitrary or capricious or unsupportable by substantial evidence, considering the record as a whole?

13. Did the cancellation of the desert land entries on the basis of an interpretation of 43 USC § 329 which had not been adopted, or even proposed, at the time that final proof and final payment were made on these entries, without giving the entrymen any opportunity to comply with the requirements of the new interpretation, deprive the Petitioners of their property without due process of law, in violation of Amendment 5 of the Constitution of the United States of America?

14. Are desert land entries contracts between the United States and the entrymen, which should be interpreted according to the regulations and decisions in effect at the time the entry is made?

15. Should the administrative contests have been dismissed because of the BLM's failure to state in the administrative complaints the matters of fact and law asserted?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent portion of the Due Process Clause of the United States Constitution — Amendment 5, is set forth in Appendix E., p. E-1.

The pertinent portions of the statutes involved in this case are set forth in Appendix E, pp. E-1, et seq., infra. The citations of those statutes are as follows, with volume and page citations to U.S.C., 1976 edition except 43 USC § 689, cited to the 1970 edition. 5 USC § 301, Vol. 1, p. 303; 5 USC § 552 (a) (1), Vol. 1, p. 309; 5 USC § 554, Vol. 1, p. 324; 5 USC § 556 (a), Vol. 1 p. 325; 5 USC § 556 (d), Vol. 1, p. 326, 5 USC § 558, Vol. 1, p. 328; 5 USC § 706 (2) A, C and D, Vol. 1 p. 334; 28 USC § 1254 (1), Vol. 8, p. 157; 28 USC § 1331 (a), Vol. 8, p. 164; 28 USC § 1361, Vol. 8, p. 178; 43 USC § 2, Vol. 11, p. 2; 43 USC § 162, Vol. 11, p. 28; 43 USC § 263, Vol. 11, pp. 52-53; 43 USC § 315f, Vol. 11, p. 71; 43 USC § 321, Vol. 11, pp. 79-80; 43 USC § 324, Vol 11, p. 81; 43 USC § 329, Vol. 11, p. 82; 43 USC § 336a, Vol. 11, p. 84; 43 USC § 689, Vol. 10, p. 10929; 43 USC § 1165, Vol. 11, p. 270; 43 USC § 1201, Vol. 11, p. 279; Idaho Code (I.C.) § 45-109, Vol. 8A, p. 73; I.C. § 45-901, Vol. 8A, p. 131; I.C. § 45-903, Vol. 8A, p. 135.

The pertinent portions of the regulations involved in this case are set out in Appendix E, pp. E-11, et seq., infra.

The citations of those regulations are as follows: 43 CFR § 4.478, 1975 Revision, p. 84; 43 CFR § 217.39, 1963 Revision, p. 510; 43 CFR § 217.42, 1963 Revision, p. 510; 43 CFR § 232.1 (a), 1963 Revision, p. 561; 43 CFR § 232.1 (b), 1963 Revision, p. 561; 43 CFR § 232.9 (a), 1963 Revision, p. 563; 43 CFR § 232.17 (c), 1963 Revision, p. 566; 43 CFR § 232.18 (d), 1963 Revision, p. 567; 43 CFR § 1822.3-5 (a), 1974 Revision, p. 24; 43 CFR § 1822.3-6 (a), 1974 Revision, p. 25; 43 CFR § 1852.1-4 (a) (4), 1966 Revision, p. 141; 43 CFR § 2226.1-2 (c) (3), 1964 Supp., p. 204;43 CFR § 2226.1-3 (a), 1964 Supp., p. 204; 43 CFR § 2226.1-3 (d), 1964 Supp., p. 204; 43 CFR § 2521.3 (b) (1), 1974 Revision, p. 127; 43 CFR § 2521.3 (c) (1), 1978 Revision, pp. 153-154.

STATEMENT OF THE CASE

This case involves twelve entries in Idaho made under the Desert Land Act, 43 USC § 321 et seq, Act of March 3, 1877, 19 Stat. 377, as amended.

The individual Petitioners filed applications for entry with the Bureau of Land Management (BLM) in early 1963. While the applications were being processed by the BLM, G. Patrick Morris, one of the applicants, advised BLM representatives that the entrymen intended to obtain "100% financing" for the project and, in response to concern expressed by BLM representatives regarding farming capacilities, Morris advised them that several of the entries would be leased to a single operator.

The regulations of the Department of the Interior (Department) in effect in 1963 recognized the right to mortgage a desert land entry where, under state law, the mortgage is regarded as merely creating a lien.[1] Under Idaho law a mortgage creates only a lien.[2] The regulations contained no reference to leases on desert land entries. Several decisions of the Department had approved leases on other types of entries. See, e.g., *Thomason* v. *Patterson*, 18 Land Dec. 241 (1894); *Elnora C. Jetes*, 33 Land Dec. 41 (1904).

Negotiations by Morris with several irrigation supply companies led to "water right contracts" with Sailor Creek Water Company (Sailor Creek)[3] under which Sailor Creek agreed to construct the irrigation system to reclaim the entries and to sell perpetual water rights to the entrymen, with the purchase price secured by a mortgage on the entry. The water right contracts were approved by the BLM. A copy of the applicable mortgage was attached to each water right contract as an exhibit. On August 30, 1963, the BLM issued a decision recognizing Sailor Creek as source of water for the entries, based on the contracts, and Sailor Creek started construction of the irrigation system, which was completed early in 1964 at a cost of approximately $700,000.00. The applications were "allowed" between November 1, 1963 and March 13, 1964. As each entry was allowed, the lease for that entry was recorded in the county records.

In late September, 1963, eleven entrymen made

[1] 43 CFR § 232.18 (d)

[2] Idaho Code §§ 45-109, 901 and 903.

[3] Since September, 1964, a division of Farm Development Corporation, one of the Petitioners.

leases to Morris and Allen T. Noble, for two years with two five-year renewals. Noble discussed the leases with a BLM field representative and the BLM District Manager before they were made. The rent agreed upon was comparable to that paid for privately owned land of similar quality in the same general area. Early in 1964 Morris and Noble subleased for 1964 to Sailor Creek and Morris leased the land in his own entry to Sailor Creek for 1964.

On February 17, 1964, the Secretary of the Interior (the Secretary), through his delegate, issued a decision[4] which impliedly approved the development and farming provisions of a development contract which gave the developers the use of 640 acres covered by applications for two desert land entries for farming for four years.

By May of 1964 the reclamation, irrigation and cultivation requirements of 43 USC § 329 had been completed for all twelve entries, and on June 8 and 9, 1964, final proof was submitted and final payment was made. The BLM field report on final proof noted that the entries were being farmed by Sailor Creek under contract with the entrymen.

On July 7, 1964, the BLM requested the entrymen to furnish copies of their contractual arrangements, noting that "There is nothing of record with this office that shows such contractual arrangements." The requested copies were furnished July 24, 1964.

On August 14, 1964, the Director of the BLM issued a decision[5] in which he held that the holding limitation

[4] *Glenn W. and Margie R. Jensen*, A-29867.

[5] *Raymond T. Michener, et al.*, Idaho 012234, et al.

of 43 USC § 329 applied only to entrymen and not to mortgagees or lessees, and that 20-year leases, coupled with mortgages, were not assignments under 43 USC § 324.

In September of 1964 Morris assigned his interest in the eleven leases to Sailor Creek, and leased his entry to Sailor Creek for 1965 with two five-year renewals. Noble assigned his interest in the leases to Sailor Creek in February of 1965.

On April 9, 1965, the Secretary issued an order[6] setting aside the BLM Director's 1964 decision in *Michener*, based on an opinion made April 5, 1965, by the Solicitor of the Department.[7] The BLM did not notify the Petitioners that the interpretation of 43 USC § 329 stated in the Solicitor's Opinion would be applied to their entries and did not order them to cancel the leases and mortgages.

On May 13, 1966, the BLM filed administrative contest complaints against the twelve entries. Contrary to the requirement of the Department's regulations (43 CFR 1852.1-4 (a) (4) (1966 Revision)) and the statutory requirement that the entrymen be furnished timely notice of the matters of fact and law asserted (Act of June 11, 1946, c. 324, § 5, now 5 USC § 554 (b) (3)), the charges in the complaints did not state any of the facts relied upon and did not specify that the mortgages and leases violated 43 USC § 324 or 43 USC § 329. The statute of limitations for contesting the desert land entries, 43 USC § 1165 (Act of March 3, 1891, c. 561, §

[6] 72 Int. Dec. 182-183.

[7] 72 Int. Dec. 156.

7, 26 Stat. 1098), expired on June 8, and June 9, 1966.

On December 30, 1966, the Secretary issued a decision in *United States* v. *Shearman*, 73 Int. Dec. 386, which involved mortgages and 20-year leases on 3,688.6 acres of desert entry land, in which he held that the right to possess, reclaim, farm, retain the farming proceeds and pledge the entries gave the mortgagee-lessee complete dominion over the entries for a period of 20 years and constituted a prohibited assignment and holding in excess of 320 acres of desert land.[8]

After 38 days of hearings, followed by extensive briefing, the Administrative Law Judge issued a decision[9] on these entries, in which he made extensive and comprehensive findings of fact and conclusions of law and ruled in favor of the entrymen on all charges, and he directed issuance of patents. He also found that the entrymen had acted in good faith.

The Government appealed to the Interior Board of Land Appeals (IBLA).

In 1972, while the appeals to the IBLA were pending, the Secretary caused patents to be issued on two desert land entries aggregating 593.38 acres, which had been developed by third parties under leases which permitted the lessees "to have and hold" the entries for five farming seasons.[10] The lessees constructed and paid for the irrigation system and con-

[8] 73 Int. Dec. at 428.

[9] App. A, p. A-1, Decision dated January 29, 1971.

[10] *Waymon D. Yarbrough*, Idaho 07212, *Wells Hepworth*, Idaho 07289, February 15, 1972.

ducted and paid for all farming operations, and received all crop income from the land. The BLM filed administrative contests, charging that the lease arrangements constituted assignments of the entries and that the lessees held more than 320 acres of desert land prior to patent. The contests were dismissed as to all but 40 acres of one entry by the same Administrative Law Judge who made recommended decision in *United States* v. *Shearman*, supra. He concluded that the entrymen had not surrendered sufficient control of their entries under the five-year leases to constitute an assignment nor result in a holding by the lessees.

The IBLA, in April of 1975, issued its decision on these entries, ruling that Sailor Creek held more than 320 acres of desert land and that, because it found the BLM had no knowledge of the "totality of the arrangements" until it "required" copies of the contractual arrangements, the Government was not estopped from applying its 1966 interpretation of 43 USC § 329 to these entries. The IBLA did not explain or distinguish the Administrative Law Judge's finding that the BLM knew in 1963 that the entrymen intended to obtain 100% financing and to lease the entries to a single farming entity. The IBLA did not reverse the Administrative Law Judge's determination that the transactions did not constitute assignments of the entries, nor did it disturb his finding that the entrymen acted in good faith.

The IBLA ordered rejection of the final proofs and cancellation of the entries, without affording the entrymen any opportunity to comply with the IBLA's

interpretation of § 329, and without any explanation of its sudden departure from the Department's longstanding policy of giving only prospective operation to changes in interpretation of the Desert Land Act.

The entrymen sought judicial review and on December 17, 1976, the District Court ruled in an unreported decision, [11] on cross-motions for summary judgment, that the IBLA interpretation of 43 USC § 329 "cannot be said to be without any rational basis" and because the "courts give great weight to any reasonable construction of a regulatory statute adoped by the agency charged with the enforcement of that statute" (quoting from *Investment co. Institute* v. *Camp*, 401 U.S. 617, 626-627, 91 S. Ct. 1091, 1097, 28 L. Ed. 2d 367 (1971)), it must be affirmed. The District Court then found that under the circumstances of the case the cancellation of the entries was an abuse of discretion and the IBLA was estopped from enforcing "an unconscionable forfeiture in favor of the government of huge private expenditures, with substantially increased land values and without any opportunity provided to the entrymen, who were admittedly acting in good faith, to equitably redeem themselves from the change in administrative policy which occurred long after their final proof submissions." App. C., p. C-10-11. The District Court allowed the entrymen until May 1, 1977, to divest themselves of the "disqualifying assignments" and ordered issuance of patents upon proof of divestiture.

[11] App. C., p. C-1.

The District Court adopted the findings of fact made by the Administrative Law Judge. It also indicated that the IBLA's action violated the spirit and intent of 5 USC § 552. The District Court relied on and applied the policy stated in the Department's decision in *Freeman* v. *Laxton*, 48 Land Dec. 519 (1922), to the effect that where "assignments of desert land entries are submitted to the BLM and it is found that the assignment cannot be recognized on account of disqualification of the assignee, the assignment is disallowed and the title is considered as retained in the assignor."[12] This provision was included in the 1964 regulations as 43 CFR 2226.1-2 (c) (3).

On appeal and cross-appeal to the United States Court of Appeals for the Ninth Circuit, the Court of Appeals reversed,[13] holding that (1) the interests of the entrymen had not vested, (2) the transactions clearly were assignments of the entries under 43 USC § 324, (3) the IBLA decision was consistent with the Secretary's 1966 decision in *Shearman*, supra, (4) the IBLA determination that the Government was not informed of the terms of the leases until it made a specific request for the information was controlling over the Administrative Law Judge's several findings that the BLM knew that the entrymen intended to lease to a single entity, (5) because the knowledge element was not satisfied, the IBLA was not estopped from applying its changed interpretation of § 329, (6) the Department's failure to publish regulations embodying its interpretation of § 329 might have taken on signifi-

[12] 48 Land Dec. at 520.

[13] 593 F. 2d 851 (9th Cir., 1978), App. D, p. D-1, at D-9.

cance if the knowledge element of equitable estoppel had been met, (7) the District Court exceeded its powers in ordering the Department of the Interior to issue patents upon divestiture by Sailor Creek of the "assignments", and (8) the District Court finding that cancellation of the entries was statutorily justified and the absence of true grounds for estoppel required that the IBLA decision be affirmed.

In arriving at its interpretation of § 329, the IBLA did not analyze the legislative history of § 329 and did not explain the absence of any regulations on leasing desert land entries from 1877 to the date of the IBLA's decision. Both the lower courts approved the IBLA's interpretation of § 329 without discussion of the legislative history or the subsequent administrative practice, except for the notation by the Court of Appeals that the interpretation was consistent with the Secretary's 1966 interpretation in *Shearman*, supra, and the District Court's taking of judicial notice that the BLM permitted multi-entry development leases on desert entries in Idaho between 1950 and 1965.

Jurisdiction in the District Court is based on 28 USC § 1331 (a), see *Andrus* v. *Charlestone Stone Prod. Co., Inc.*, 436 U.S. 604, 607, 56 L. Ed. 2d 570, 574 (1978), and on 28 USC § 1361. Jurisdiction at the time of filing the complaints also existed under 5 USC §§ 701, et. seq.

REASONS FOR ALLOWANCE OF THE WRIT

A. *Introduction*

Review of the decision of the Court of Appeals is appropriate at this time because the IBLA decision which it affirmed involved significant, unexplained departures from several long-established policies of the Department applicable to transactions under the Desert Land Act and other public land laws. The precedents established by the decision of the Court of Appeals are controlling in the Ninth Circuit, where a substantial, if not major, portion of the public lands is located, and those precedents will permit the BLM to disregard established policies and guiding precedents in its administration of the public lands, resulting in the inherently arbitrary ad hoc determinations criticized by this Court in *Morton* v. *Ruiz*, 415 U.S. 199, 232, 39 L. Ed. 2d 270, 292 (1974). Coupled with the apparent approval of complete disregard of the publication requirement of 5 USC § 552, these precedents will detract substantially from the stability and uniformity of administration of the public land laws in states in the Ninth Circuit.

The precedents established could easily tend to encourage all administrative agencies to seek new interpretations to apply to pending transactions to obtain unwarranted and unfair advantages or windfall gains for the Government.

The questions of whether combinations of mortgages and leases are prohibited by 43 USC §§ 324 and 329 are important questions of federal law which have not been, but should be, settled by this Court. The BLM

has reported that in Idaho, alone, there are 69 allowed desert entries covering 20,210 acres, and approximately 1,400 applications for desert entry pending, which could involve as many as 448,000 acres. Proper interpretation of § 324 and § 329 is important to those entrymen and applicants, as their planning for development, farming and financing will depend upon the latitude permitted by the Desert Land Act.

The Petitioners who are entrymen submitted their final proof 15 years ago, and the possibility is realistic that another three to four years could be required to obtain a decision final in all respects in the Court of Appeals. The interests of both the Petitioners and the judicial system would be served by a decision of this Court, favorable to the Petitioners, by which the litigation could be terminated.

The decision of the Court of Appeals is in conflict with applicable decisions of this Court on (1) the meanings of the words "assign" and "assignment" as used in 43 USC §§ 324 and 329, and the meaning of "hold" in 43 USC § 329, (2) the requirement that the Secretary publish regulations, (3) the vesting of rights under public land laws, (4) the limitations of the Secretary's authority, (5) the binding effect of usages, policies and regulations of the Department, (6) the necessity for using legislative history and other aids to statutory interpretation, (7) the deference to be given administrative interpretations, (8) the possession of land in entries under the public land laws, (9) the retroactive application of administrative decisions, (10) the requirements of due process, (11) the requirement that

administrative orders be upheld only on the basis asserted by the agency, and (12) the requirement that an agency satisfactorily explain its reasons for departures from established policies.

Also, the decision of the Court of Appeals is in conflict with decisions of the Courts of Appeals for the Fourth Circuit in *Appalachian Power Co.* v. *Train*, 566 F. 2d 451 (1977), and the District of Columbia Circuit in *Gonzales* v. *Freeman*, 334 F. 2d 570 (1964), on the question of whether the IBLA's interpretation of 43 USC § 329 must be published in accordance with 5 USC § 552 (a), and is in conflict with the decisions of the Courts of Appeals for the District of Columbia Circuit in *Braniff Airways, Inc.* v. *C.A.B.*, 379 F. 2d 453 (1967), and Tenth Circuit in *Adolph Coors Corp.* v. *F.T.C.*, 497 F. 2d 1178 (1974), and *Diamond Ring Ranch, Inc.* v. *Morton*, 531 F. 2d 1397 (1976), on the questions of whether the IBLA decision is supported by substantial evidence and the weight to be given the findings of the Administrative Law Judge, and is in conflict with the decisions with the Courts of Appeals for the District of Columbia Circuit and Eighth Circuit in *West* v. *United States*, 30 F. 2d 739 (1929), and *James* v. *Germania Iron Co.*, 107 F. 597 (1901), on the question of binding effect of administrative policies and regulations, and is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Christopher*, 71 F. 2d 764 (1934), on the question of whether recording in the county records constitutes notice to the United States, and is in conflict with the decision of the Court of Appeals for the First Circuit in *Stone & Webster Engineering Corp.* v. *NLRB*,

356 F. 2d 461 (1976), and that of the Sixth Circuit in *NLRB* v. *Cleveland Trust co.*, 214 F. 2d 95 (1954), on the question of disregarding uncontradicted testimony.

B. *The holding proviso of 43 USC § 329 is a limitation on the quantity of land to which title can be acquired, and was not intended to include mortgages and leases.*

The Desert Land Act[14] provides for sale of as much as 320 acres of public land to qualified citizens who fulfill the reclamation, irrigation, cultivation and expenditure requirements of the Act. Originally enacted in 1877,[15] the Desert Land Act was interpreted by the Department of the Interior in 1880 as not authorizing assignments of entries.[16]

The Desert Land Act was amended in 1891[17] by adding seven sections, including 43 USC § 329, which provides, in part, that upon satisfactory proof of reclamation and cultivation, and final payment of $1.00 per acre

> "* * * a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert land * * *."

In construing this statute against the background of its purpose, the Department and the courts should be guided by traditional canons of, and aids to, statutory construction.

[14] 43 USC §§ 321-322, Act of March 3, 1877, C. 107, §§ 1-3, 19 Stat. 377.
[15] The act authorized sale of 640 acres to each qualified person.
[16] *S. W. Downey*, 7 C.L.O. 26 (1880)
[17] 43 USC §§ 323, 325-329, Act of March 3, 1891, c 561, § 2, 26 Stat. 1096.

> " 'A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' Church of the Holy Trinity v. United States, 143 US 457, 459, 36 L. Ed. 226, 12 S Ct 511 (1892)." *United Housing Federation, Inc.* v. *Forman*, 421 U.S. 837, 849, 44 L. Ed. 2d 621, 630 (1975).
>
> "* * * The object desired to be reached by the Act must limit and control the literal import of the terms and phrases employed." *Church of the Holy Trinity* v. *United States*, 143 U.S. 457,460, 36 L. Ed. 226, 228 (1892).
>
> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body." *Church of the Holy Trinity* v. *United States*, supra, 143 U.S. at 463, 36 L. Ed. at 229, citing *United States* v. *Union Pac. R. Co.*, 91 U.S. 72, 79, 23 L. Ed. 224, 228.

Because compliance with the Desert Land Act requires substantial expenditures in order to accomplish the reclamation desired by Congress,[18] to subserve the public interest and welfare,[19] the Act should receive

[18] The irrigation system for these entries was constructed in 1963-64 at a cost in excess of $700,000.00. The Department's regulations recognize that reclamation "is often a difficult and expensive undertaking." See 43 CFR § 232.1(b) (1963 Revision).
[19] "* * * Inducement was therefore held out by the offer of title to a square mile of land in consideration of the cost and labor required to be expended upon it in order to bring it into a productive condition. That cost and labor is a part of the price of the land — a price to be paid to the public by the purchasers in serving a public benefit while reaping a private advantage." *Instructions*, 4 Land Dec. 51, 52 (1885).

at the hands of the courts a more liberal construction in favor of the purposes for which it was enacted. Cf. *Leo Sheep Co.* v. *United States*, No. 77-1686, Mar. 27, 1979, slip op. pp. 14-15, ___U.S. ___, 59 L. Ed. 2d 677, 688 (1979); *United States* v. *Denver and Rio Grande R. Co.*, 150 U.S. 1, 37 L. Ed. 975, 14 S. Ct. 11 (1893). These lands are offered on liberal terms to encourage the citizen and to develop the country, and where there has been a compliance with the substantial requirements of the law irregularities should be waived or permission given, even on appeal, to cure them by supplemental proofs. Cf. *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250, 258, 58 L. Ed. 943, 948 (1914). Fair protection of the entryman in his dealings with the Government ought to be given when possible. Cf *Smith* v. *United States*, 170 U.S. 372, 381, 42 L. Ed. 1074, 1077 (1898).

The clearly relevant history of a statute should not be ignored in determining its meaning. See *Cass* v. *United States*, 417 U.S. 72, 79, 40 L. Ed. 2d 668, 674 (1974). It was error for the IBLA and the lower courts to ignore the legislative history of § 329 in arriving at their interpretation of the holding limitation. *Train* v. *Colorado Public Int. Research Group*, 426 U.S. 1, 9-10, 48 L. Ed. 2d 434, 441 (1976).

The reason for the holding limitation in § 329 can be ascertained by examining debate and reports on bills before Congress in 1886 and 1888, together with debate and the report on the 1891 Amendment. In 1886 an amendment proposed by H.R. 8102[20] would have

[20]App. F, p. F-1.

required annual expenditures of $1.00 per acre and aggregate expenditures of $3.00 per acre within three years. The committee report[21] stated:

> "* * * Time and experience will doubtless suggest still further improvement, but the amendments now proposed, if enacted into law and properly administered, will prevent holding of land thereunder without reclamation and for mere speculation. Failure to annually expend the required sum in reclamation when met by prompt loss of the land and forfeiture of moneys paid will afford no opportunity for the abuses which now exist, but will render it certain that in the large majority of cases the object of the law will be promptly and successfully accomplished."

In debate in 1888 on H.R. 7901,[22] Representative Vandever of California noted that in his district, soon after passage of the 1877 Act, nearly 400,000 acres were located upon and

> "almost immediately the parties who made the location transferred and assigned the land to other parties. Today the land is *held* by a syndicate that has never paid but 25 cents an acre for the land. The parties who made the location were dummies. (Emphasis supplied)
>
> "* * * Now, what I fear in regard to this matter is that if we recognize in this bill the right of a man under the desert-land act to assign his title before he has perfected it, it may be claimed that this is a recognition

[21]House Report No. 1888, April 23, 1886.
[22]App. F, pp. F-1-4.

of the right of those locators in 1877 to assign their title to the syndicates that claim to hold them today. This is a matter of very great importance to the people of that country. There is a crying evil there which they charge upon the present administration of the Land Office and of the Interior Department." 19 Cong. Rec. 5571-5572.

Mr. Vandever's concern was reflected in, and eliminated by, an amendment offered by him and agreed to by the House:

"Add the following proviso to the last line of the bill:

"*Provided*, that nothing in this act shall be construed to legalize assignments heretofore made by claimants under the desert-land act of the rights acquired by them as locators on these lands.

"Mr. HOLMAN. That is right. While I do not think there is anything in the bill which could have the effect against which the amendment proposes to guard, yet if there is anything of that sort the amendment is very proper.

"Mr. VANDEVER. I modify the amendment by adding to it the words 'prior to making improvement thereon.'

"The amendment as modified was agreed to." 19 Cong. Rec. 5596 (1888)

The holding proviso in the 1891 Amendment is logically the successor to Representative Vandever's amendment to H.R. 7901. No intervening reports or debates indicate any concern about leases or

mortgages. To the contrary, congressional debate on H.R. 7901 indicates that the members of the House were concerned with excesses by landowners, not tenants, and the distinction between owning and leasing was well understood.[23] The entire trust of the concern was directed to assignments of title under which large acreages were held by speculators without reclamation. All the objections were cured by the reclamation and expenditure requirements and the holding limitation.

The Committee Report on the 1891 Amendment, in its only reference to the Desert Land Act, stated:

"* * * Section 2 provides modification of the desert-land act, providing fully for actual reclamation of the land entered, and preventing speculative accumulation of land, with a saving of all rights under existing entries." 22 Cong. Rec. 3613 (1891).

In congressional debate on the 1891 Amendment, the holding limitation was explained in the following manner:

"Mr. STONE, of Missouri. I desire to ask the gentleman from Illinois what limitation, if any, is fixed by this conference bill on the right to assign desert-land entries."

"Mr. PAYSON. The provision in the bill is that there shall not be any assignment whatever, so that any one person *shall acquire in any way* more than 320 acres. (Emphasis supplied)

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[23] See 19 Cong. Rec. 5601-5602 (1888).

"Mr. HOLMAN. There is provision for assignment, but not to an amount more than 320 acres." 22 Cong. Rec. 3614 (1891).

"It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. *The Abbotsford*, 98 U.S. 440, 25 L. ed. 168." *Kepner* v. *United States*, 195 U.S. 100, 124, 49 L. Ed. 114, 122 (1904).

As used in the public land laws, the word "hold" had acquired a commonly understood meaning before Congress enacted § 329. Hold meant to claim, segregate or appropriate vacant public land, usually under a special preference, to the exclusion of others who desired to enter or acquire some interest in that land. By initiating a claim the entryman "hold[s] the land against others desiring to initiate claims, * * *". *Great Northern R. Co.* v. *Reed*, 270 U.S. 539, 548, 70 L. Ed. 721, 725 (1926). Before the enactment of § 329, the word was so used in a desert entry case in 1884.

> "* * * where a special preference is given to a claimant, dependent or contingent upon the performance of conditions which any one of a qualified class may reasonably fulfill, by which he may hold to the exclusion of others, such preference is a pre-emption, and inures to the individual upon the inception of his claim. Measured by these rules, a desert-land entry is much more clearly within the definition than many others which are so recognized." *Fraser* v. *Ringgold*, 3 Land Dec. 69, 71 (1884) Emphasis supplied.[24]

The syntax of 43 USC § 329, placing the holding limitation immediately after the provision for issuance of patent to the applicant or his assigns, clearly indicates an intention to coordinate the limitation with the conveyance of title by issuance of the patent. This proviso refers only to the substantive clause "a patent shall issue therefor to the applicant or his assigns" and qualifies and limits the generality of that clause. Cf. *Cox* v. *Hart*, 260 U.S. 427, 435, 67 L. Ed. 332, 337 (1922). Comparison with a bill introduced in 1886, H.R. 8102, Section 7 of which[25] was practically identical to 43 USC § 329, except that the time allowed to prove up was three years instead of four and the clause containing the holding limitation was omitted in the 1886 version, shows that the insertion of the holding limitation at that place in 43 USC § 329 was deliberate and intended as a limitation on the issuance of patent.

The insertion of the holding limitation in the 1891 amendment also shows that Congress did not rely on "clear Departmental policy" that the IBLA contends had already established limitations on assignments. See 82 Int. Dec. at 155, App. B, p. B-19. Without the holding limitation, the 1891 Amendment could have overridden the departmental policy and permit-

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[24] Other cases using "hold" in the same sense include *Schetka* v. *Northern Pacific Railroad Co.*, 5 Land Dec. 473 (1887); *Fleming* v. *Bowe*, 13 Land Dec. 78 (1891); *James F. Bright*, 6 Land Dec. 602 (1888); *Pfaff* v. *Williams*, 4 Land Dec. 455 (1886); and *Emmerson* v. *Cent. Pacific Railroad Co.*, 3 Land Dec. 271 (1884).

[25] App. F, pp. F-1-4.

ted acquisition of unlimited quantities of land through assignments. Assignments were beyond the restriction of the 1890 Act cited by the IBLA[26], which applied only to original entrymen, not to assignees.[27] When it enacted § 329, Congress had the option to restrict assignments or to permit unlimited assignments. That it adopted a policy which happened to coincide with the former administrative policy lends no strength to the IBLA's contention that the prior administrative policy would have prevailed. Under somewhat similar circumstances this Court has ruled that administrative practice prior to the adoption of a statute is of no moment. See *United States* v. *Townsley*, 323 U.S. 557, 567, 89 L. Ed. 454, 461 (1944).

The Timber Culture Law[28] required the entrymen to state under oath that he made application for his own exclusive use and benefit and that he intended to hold and cultivate the land. Under those express statutory requirements the Department consistently ruled before 1891 that the law did not require presence of the entryman on the entry, or even in the state where the land was located, and that all acts necessary to perfect the entry could be performed by an agent.[29] In *Davies* v. *Killgore*, 11 Land Dec. 161 (1890), the non-resident entryman paid his agent $25.00 per year

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[26]26 Stat. 391, 43 USC § 212, repealed October 21, 1976, § 702, 90 Stat. 2787, cited at 82 Int. Dec. 155, App. B, p. B-19.

[27] Cf. *Webster* v. *Luther*, 163 U.S. 331, 340-341, 41 L. Ed. 179, 182 (1896).

[28] Act of June 14, 1878, 20 Stat. 113.

[29] *Lucas* v. *Ellsworth*, 4 Land Dec. 205 (1885); *Davies* v. *Killgore*, 11 Land Dec. 161 (1890); Danford v. Ellsworth, 10 Land Dec. 341 (1890); *Olsen* v. *Warford*, 11 Land Dec. 289 (1890); *Hemstreet* v. *Greenup*, 4 Land Dec. 493 (1886); *Gahan* v. *Garrett*, *1 Land Dec. 137 (1882)*; *Flemington* v. *Eddy*, 3 Land Dec. 482 (1884); *Saylor* v. *Wilson*, 7 Land Dec. 493 (1888).

and let the agent have whatever crops he might raise on the entry, apparently without reserving any rent, yet the Department did not charge that the entryman failed to "hold" the entry. In *Klock* v. *Husted*, 2 Land Dec. 329 (1884), the entryman abandoned the land, but was regarded by the Department as still holding the entry, albeit for the use and benefit of another party.

Although the adminstrative agency's consistent, long-standing interpretation of the statute under which it operates is entitled to considerable weight, there are limits, "grounded in the language, purpose and history of the particular statute, on how far an agency properly may go in its interpretive role." *Teamsters* v. *Daniel*, No. 77-753, Jan. 16, 1979, slip op. p. 14, ___U.S.___, 58 L. Ed. 2d 808, 820 (1979). As stated by this Court in *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 57 L. Ed. 2d 337, 343 (1978),

> "The question is thus whether, in light of the normal aids to statutory construction, the Department's interpretation is 'sufficiently reasonable' to be accepted by a reviewing court. * * *"

The general rule that contemporaneous, long-standing and consistent administrative interpretation of a statute is entitled to considerable weight, as reiterated in *Zenith*, supra, is not applicable to the IBLA's interpretation of the holding limitation, as applied in this case. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-145, 50 L. Ed. 2d 343, 358 (1976); *Batterton* v. *Francis*, 432 U.S. 416, 425-426, 53 L. Ed. 2d 448, 456-457; *United Housing Foundation, Inc.* v. *Forman*, supra, 421 U.S. at 858, 44 L. Ed. 2d at 635-636. The

interpretation was made 84 years after enactment of § 329 and was inconsistent with all but two of the decisions,[30] instructions and regulations issued by the Department during that 84-year period, and was inconsistent with the few decisions of this Court which interpreted the Desert Land Act during that intervening period. It was inconsistent with the policy of permitting multi-entry development leases judicially noticed by the District Court as prevailing in Idaho from 1950 to 1965.[31]

The first administrative interpretation of § 329 appears to be that stated in a Circular issued by the Commissioner of the General Land Office on April 27, 1891, 12 Land Dec. 405. Leases and mortgages of desert land entries are not mentioned in the Circular. The only reference to the holding limitation states that "Assignments are recognized, but the amount of land that may be held by assignment or otherwise, prior to the issue of patent is restricted to 320 acres by the seventh section, which section it is provided, however, shall not apply to entries made prior to the act." Id. at 406. This is a "contemporaneous construction of [§ 329] by the men charged with the responsibility of setting

[30]Neither the Secretary's decision in *Shearman*, supra, nor the IBLA's decision in this case, contains any "suggestion that some new source of legislative history had been discovered" after the decisions in *Jensen*, supra, and *Michener*, supra, were issued. Cf. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 145, 50 L. Ed. 2d 343, 360 (1976). The other decision, *United States* v. *Grigg*, 82 Int. Dec. 123, was issued the same day as the IBLA decision in this case.

[31]App. C, pp. C-11-12. A custom in which an administrative agency acquiesces is persuasive of the meaning of the statute. Pennell v. Philadelphia & Reading Ry. Co., 231 U.S. 675, 58 L. Ed. 430. "The significance of the legislative history emerges upon study of the subsequent administrative practice." *Zuber* v. *Allen*, 396 U.S. 168, 182, 24 L. Ed. 2d 345, 354 (1969).

its * * * machinery in motion, Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, 77 L. Ed. 796, 53 S. Ct. 350 (1933), [and] its interpretation of how [§ 329] should be implemented is presumptively correct. See, ibid, Udall v. Tallman, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965)." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 648, 56 L. Ed. 2d 591, 604 (1978). That presumption is not overcome by the IBLA's after-the-fact analysis of § 329, which disregards the regulations on mortgages and contains no explanation for the absence of regulations on leases.

The absence of regulations on leasing reflects a view that §§ 324 and 329 were not intended to cover leases. It is a practical construction adopted "before the present controversy arose or was thought of." *McLaren* v. *Fleischer*, 256 U.S. 477, 481, 65 L. Ed. 1052, 1053 (1921); *Udall* v. *Tallman*, supra, 380 U.S. at 318, 13 L. Ed. 2d at 626 (1965).

The contemporaneous, long-standing interpretation actually made by the Department is reflected in its decisions[32] construing the holding limitation as a limitation on the amount of land to which one could acquire title, and in the decision and regulations permitting mortgages cited at note 42, infra, and in the absence of regulations on leasing, which amounts to a practical construction that 43 USC §§ 324 and 329 do not cover leases. See *Davis* v. *Manry*, 266 U.S. 401, 404-405, 69 L. Ed. 350, 352 (1925); *United States* v. *Chicago, St. P., M. & O. Ry. Co.*, 43 F. 2d 300,

[32] See, e.g., *Herbert C. Oakley*, 34 Land Dec. 383, 387 (1906); *Silsbee Town Company*,34 Land Dec. 430 (1906).

305-306 (CA-8th Cir., 1930); cf. *Logan* v. *Davis*, 233 U.S. 613, 627, 58 L. Ed. 1121, 1128 (1914). If the statute applied to leases, the Department would have been "solicitous to enforce it." *Davis* v. *Manry*, supra. But throughout the 13-year course of these proceedings the Government has not cited a single pre-1965 case in which an ordinary lease was held to violate 43 USC § 324 or 43 USC § 329, and the IBLA was unable to cite any judicial or administrative decisions holding that leases and mortgages had been included in § 329 before 1965.

Equally important is the absence of any reference to mortgages or leases in the regulations regarding qualifications for making entries and taking assignments. The applicable regulation, 43 CFR 232.9 (a) (1963 Revision), requires an applicant to state that "he has not previously exercised the right of entry under the desert-land laws by filing an allowable application and withdrawing it prior to its allowance or by making an entry or by having taken one by assignment * * *." It would be appropriate, if the holding limitation extended to mortgagee-lessees, to require a statement that the applicant had never been the mortgagee-lessee of any desert entry land, because under the IBLA's interpretation the area "held" under the mortgage-lease transaction would count against the area the applicant could hold under his own entry. If the mortgage-lease transaction involved 320 acres, the applicant would be disqualified by reason of his prior holding from making any entry at all.

It is presumed that Congress approved the limitations prescribed by § 232.9 (a) when it amended 43

USC § 321 in 1958 without including any requirement that applicants be disqualified to the extent of prior mortgage-lease transactions on other desert land entries.[33] And it cannot be presumed that Congress would have acquiesced in these regulations for more than 50 years, if it intended to include mortgage-lease transactions in the holding limitation.

The lack of any evidence that Congress intended to include mortgages and leases in the holding limitation of § 329, the absence of regulations on leasing, and expressions by Congress, as late as 1955[34] and by the Department, as late as 1964,[35] that the 1891 Amendment reduced to 320 acres the amount that could be entered, bring this case within the rule that "Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969); see also Zuber v. Allen, 396 U.S. 168, 193, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969); Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272, 19 L. Ed. 2d 1090, 88 S. Ct. 929 (1968)." *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94-95, 38 L. Ed. 2d 287, 295 (1973).

The holding proviso of § 329 is the only place in Section 2 of the 1891 Amendment in which a limitation of 320 acres appears.

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[33] § 321 contains the applicable provisions stating the qualifications of entrymen.

[34] "The act of 1877 * * * was amended by the act of March 3, 1891, * * * to reduce the allowable maximum to 320 acres to any one person." House Rep. No. 626, p. 1, 84th Cong., 1st Sess., 1955.

[35] See Acreage Limitation Policy, p. 1 (A Study Prepared by the Department of the Interior for the Committee on Interior and Insular Affairs, 1964.)

The Department's course of action also establishes a defined usage regarding leases and mortgages of desert land entries, which is of controlling significance under the rule established in *United States* v. *McDaniel*, 7 Peters 1, 14-15, 8 L. Ed. 587, 592 (1833):

> "* * * Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a respective effect, but must be limited to the future.
>
> "Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

The Department long has recognized that the rule stated in *McDaniel*, and the similar rule stated in *United States* v. *Alabama Great Southern Railroad Co.*, 142 U.S. 615, 621, 35 L. Ed. 1134 (1892), apply to the Department. See, e.g., *Roy McDonald*, 36 Land Dec. 205, 208-209 (1907).[36]

The IBLA did not explain either the significance of its assertion that the Desert Land Act is a settlement law, or how a settlement feature could prevent leasing or mortgaging of entries. Residence is not a requirement of the Desert Land Act,[37] therefore there is no

[36] "The decisions clearly show that sudden changes in the construction of statutes, by those charged with their enforcement, are looked upon with disfavor, especially where a construction favorable to the individual has been acted upon and the change is made in such manner as to become retroactive." 36 Land Dec. at 209.

[37] *Cox* v. *Hart*, supra.

need to reserve the use of a residence area on the entry as the Department sometimes has held is necessary in leasing homestead entries.[38] Where Congress has intended to limit the use of the entry it always has done so with express language such as that used in Section 5 of the 1891 Amendment, for homesteads, and presumably it would have employed the same language had it desired to impose that restriction on desert land entries.

The decisions[39] and instructions[40] of the Department have long recognized that the Desert Land Act is not a settlement law, and at least one member of Congress was so advised as early as 1885.[41] And the Department has long recognized the right to mortgage a desert land entry.[42]

These factors, together with the Department's long established policy of permitting leases of homestead entries[43], which were required[44] to be made for the

[38] See, e.g., *Thomason* v. *Patterson*, 18 Land Dec. 241 (1894).

[39] "* * * The claim of Bond was initiated under the act of March 3, 1877 (19 Stats., 377), which is entitled 'An act to provide for the sale of desert lands in certain states and territories.' This act provided for the disposal of a certain portion of the public domain *by sale, instead of by settlement*, as provided by the homestead and pre-emption laws. *The entries possess none of the characteristics of settlement entries, as to residence and settlement, and all the acts of improvement may be done by an agent, instead of by the claimant in person.* Congress has been careful to note the marked distinction which exists between claims initiated under the settlement laws and those initiated under the laws providing for the sale of public domain. * * *" (Emphasis supplied) *Bond's Heirs* v. *Deming Townsite*, 13 Land Dec. 665, December 8, 1891. See, also, *Charles Perrine*, 3 Land Dec. 331 (1883); *Fred Bartine*, 59 Land Dec. 110 (1945).

[40] June 22, 1892, 14 Land Dec. 677, 679.

[41] *Julius M. Wilde*, 3 Land Dec. 325.

[42] *Thomas E. Jeremy*, 24 Land Dec. 418 (1897); 43 CFR 2226.1-3(d).

[43] See, e.g., *Elnora C. Jetes*, 33 Land Dec. 41 (1904).

[44] 43 USC § 162 (repealed October 21, 1976, P.L. 94-579, § 702, 90 Stat. 2787).

entryman's own use, remove all substance from the IBLA's theory that some sort of settlement aspect prevents mortgaging and leasing desert land entries. Since the settlement distinction is ineffective, the precedent established in decisions such as that in *United States* v. *Colorado Anthracite Co.*, 225 U.S. 219, 56 L. Ed. 1063 (1912), should be applied to § 329 to support a conclusion that the holding proviso is a limitation on the acquisition of title.

The IBLA should have applied the rule of ejusdem generis to the clause "hold by assignment or otherwise", just as this Court in *Ham* v. *Missouri*, 59 U.S. 126, 15 L. Ed. 334 (1855), applied that rule to the clause "sold or otherwise disposed of " to determine that "or otherwise disposed of " must signify some disposition equally efficient with a sale. As shown in Part C, infra, an assignment always has been considered to be a transfer of the entire interest of the entryman, and the entire clause should be interpreted as applying to transactions which are equivalent to, or have the same practical effect as, an assignment of the entry.

The IBLA's contentions regarding the meaning of "otherwise" in the holding limitation of 43 USC § 329 (App. B, pp. B-22-23.) are directly contrary to the precedent established by this Court's decision in *United States* v. *Sheldon,* 15 U.S. 119, 121-122, 4 L. Ed. 199, 200 (1817). In *Sheldon,* the question was whether the driving of live oxen on foot was a "transportation" of them within the true intent and meaning of a law which prohibited transportation "in any wagon, cart,

sleigh, boat, or otherwise," and provided for forfeiture of the articles transported and the vehicle in which they were transported. In concluding that the prohibited transportation must be by means of a vehicle similar to those enumerated, the Court stated

> "* * * To transport an article in a wagon, or otherwise, would seem necessarily to mean to carry or to convey it in that or in some other vehicle, by whatever name it might be distinguished.* * * "
>
> "But so far from this matter being left a doubt by the law, we find, that when the punishment by way of forfeiture is prescribed, the words 'or otherwise' are very plainly construed to mean the thing by which the articles are transported; thus distinguishing between the thing which transports and the thing which is transported."
>
> "* * * If it were impossible to satisfy the words 'or otherwise,' except in the way contended for on the part of the United States, there would be some reason for giving that interpretation to them. But it has been shown that this is not the case."
>
> And see Reiche v. Smythe, 80 U.S. 162, 20 L. Ed. 566 (1872).

The same principle should be applied here, to limit the scope of the phrase "by assignment or otherwise" to transactions having the same practical effect as an assignment.

The IBLA's interpretation of § 329 is contrary to that stated by this Court in *United States* v. *Healey*, 160 U.S. 136, 148-149, 40 L. Ed. 369, 373 (1895), in which the holding limitation was referred to as

"* * * the clause or provision relating to the quantity of desert lands that any person or association of persons might appropriate. * * *"

This meaning of hold comports with the common understanding that to hold property is to own it.[45] And, although the legal title remains in the United States until patent issues, the entryman has an inchoate, equitable or possessory title so long as he complies with the requirements of the Desert Land Act.[46] The title interest of a desert entryman was recognized by Congress in the 1888 debate on H.R. 7901[47] and in the Act of June 25, 1910, c. 437, 36 Stat. 867, in which relief was granted to "* * * any person, other than a corporation, who has in good faith * * * acquired by assignment a desert-land entry,* * * in the belief that he was obtaining a valid title thereto * * *."

This meaning was confirmed by Congress in a relief act passed in 1956[48] which provided that "* * * any person who holds a * * * desert land entry which was allowed and subsisting on March 1, 1956 * * * is hereby granted permission to suspend until March 1, 1959 further operations looking to the cultivation and improvement of the lands: Provided, That *such entryman* shall forfeit no rights and shall not otherwise be excused from full compliance with the applicable public land laws by reason of * * * such suspension of cultivation and improvement operations * * *." Emphasis supplied. Congress obviously regarded the entryman

[45]See *McFeely* v. *Commissioner of Internal Revenue*, 296 U.S. 102, 107, 80 L. Ed. 83 (1935).

[46]See *Instructions*, 34 Land Dec. 29 (1905).

[47]Supra, at 21.

[48]43 USC §§ 336a, Act of July 30, 1956, c. 778 § 1, 70 Stat. 715.

as the "person who holds a desert land entry", and the committee reports[49] indicate that the Senate and House Committees on Interior and Insular Affairs, and the Assistant Secretary of the Interior used the word "entryman" and the phrase "holder of a desert-land entry" interchangably.

It is significant that the permission to suspend operations is granted to the person who holds the desert land entry. That could only be the entryman, because a mortgagee or a tenant would have no need for such permission because he would have no obligation or responsibility for cultivation and improvement of the lands in the entry, that being entirely the responsibility of the entryman, although it has long been held that he may have the work done by others. See, e.g., *Williams* v. *Kirk*, 38 Land Dec. 429 (1910); *Bond's Heirs* v. *Deming Townsite*, supra, at note 39.

Upon allowance of his application, the entryman becames entitled to exclusive possession of the land. 43 USC § 315f; cf. *Cameron* v. *United States*, 252 U.S. 450, 460, 64 L. Ed. 659, 662 (1919); *United States* v. *Buchanan*, 232 U.S. 72, 76-77, 58 L. Ed. 511, 514. As against all but the United States the entryman is vested with all incidents of fee simple title upon entry. Cf. *United States* v. *Clarke*, 529 F. 2d 984, 986 (CA-9th Cir., 1976). Possession may be held by exercise of such acts of ownership over the land as are necessary to enjoy the "ordinary use of which it is capable, and acquire the profits it yields in its present condition, — such acts,

[49] House Rep. No. 2737, Senate Rep. No. 2405, 84th Cong., 2nd Sess., 1956.

being continued and uninterrupted, will amount to actual possession." *Cox* v. *Hart*, 260 U.S. 427, 434, 67 L. Ed. 332, 337 (1922). A landowner may occupy his land by tenants, and such occupancy constitutes actual possession by the owner. *Northern Pac. Ry. Co.* v. *Smith*, 171 U.S. 260, 275, 43 L. Ed. 157, 163 (1897). Possession by a tenant is, in law, the possession of the entryman. *Catholic Bishop* v. *Gibbon*, 158 U.S. 155, 39 L. Ed. 931 (1895); *Rector* v. *Gibbon*, 111 U.S. 276, 28 L. Ed. 427 (1884); *Frank Johnson*, 28 L.D. 537, 539 (1898). The tenant may have actual occupation, but the landlord would still have possession. *Frank Johnson*, supra. Where a settler on public land rents his improvements to another person, the landlord, and not the tenant, is entitled to the pre-emption. *Case* v. *Larkin*, February 3, 1876; see 2 Copp's Pub. Land Laws 1330 (1882). Therefore, even under the definition adopted by the IBLA, the entrymen had actual possession and the right of actual possession, and they held the land. The IBLA disregarded the decisions of this Court in arriving at a contrary conclusion.

Application of these precedents, established rules of construction and consideration of the legislative history and the practice and policy of the Department for more than 70 years after enactment of the 1891 Amendment, must lead to the conclusion that Congress did not intend to include leases and mortgages within the meaning of "hold", as the word is used in § 329. If Congress had intended to preclude desert entrymen from employing means of financing and farming which were common practices on other types of entries and on privately owned land, surely it would

have selected specific language to accomplish that purpose.[50] Although the combination of mortgages and leases conceivably is within a literal meaning of "hold", there is no evidence that Congress intended to include mortgages and leases within that term as it is used in § 329. To the contrary, the legislative history and the contemporaneous use of "hold" indicate only an intention to limit the quantity of land for which a claim could be made and to which a patent could be obtained.

C. *The Assignment Of A Desert Land Entry Is A Transfer Of The Entire Interest Of The Entryman, and 43 USC § 324 Was Not Intended To Include Mortgages And Leases.*

Decisions of the Department in the 1890's[51] to the effect that desert entries could be assigned to corporations prompted the practice by natural persons who had exhausted their desert entry rights of creating corporations for the sole purpose of taking an assignment of a desert entry, thus circumventing the holding limitation of § 329. Although departmental decisions such as *Jacob Switzer Company*, 33 Land Dec. 383 (1905), made it more difficult to accomplish this purpose, Congress put an end to the practice in 1908 with the passage of 43 USC § 324.[52]

The words "assigns" and "assignees" as used in the public land laws, had acquired a well-settled meaning

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[50]See, e.g., *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 322, 324-325, 95 L. Ed. 969, 977 (1951); cf. *New York Tel. Co.* v. *New York Labor Dept.*, No. 77-961, Mar. 21, 1979, slip op. pp. 16-17, ___ U.S. ___, 59 L. Ed. 2d 553, 567 (1979).

[51]See, e.g., *Nevada Southern Ry. Co.*, 22 Land Dec. 1 (1895).

[52]Act of March 28, 1908, c. 112, § 2, 35 Stat. 52, App. E, p. E-8

through regulations, instructions and decisions issued by the Department before § 324 was enacted. Since March 1, 1884, if not before, assignees were regarded as "purchasers who purchase the land after entry and take assignments *of the title* after such entry." *Alonzo W. Graves,* 11 Land Dec. 283 (1890), citing *General Circular,* approved March 1, 1884. Emphasis supplied. *Graves* involved R.S. § 2362.[53]

Two cases decided by this Court before the enactment of § 324 involved repayments to homestead, timber culture or desert-land entrymen or to their "assigns", under the Act of June 16, 1880.[54] In *Hoffeld* v. *United States,* 186 U.S. 273, 46 L. Ed. 1160 (1902), the Court stated that "[A] voluntary assignee takes the property with all the rights thereto possessed by his assignor." Id. at 186 U.S. 276, 46 L. Ed. 1162. And in *United States* v. *Commonwealth Title Ins. & Trust Co.,* 193 U.S. 651, 48 L. Ed. 830 (1904), the Court said "[w]e regard the word 'assigns', as used in the statute, as one who derives from the original entryman by the voluntary act of the latter." Id. at 193 U.S. 656, 48 L. Ed. 831. The context clearly indicates the Court meant that the "assign" derived title and all rights thereto from the original entryman, because the question in the case was whether "a mortgagee who foreclosed his mortgage and purchased the property mortgaged at sheriff's sale under a decree of the court is an assignee

[53] 43 USC § 689, Act of January 12, 1825, c. 5, 4 Stat. 80; Act of February 28, 1859, c. 64, § 1, 11 Stat. 387, repealed October 21, 1976, P.L. 94-579, § 403(a), 90 Stat. 2789.

[54] C. 244, § 2, 21 Stat. 287, 43 USC § 263, repealed October 21, 1976, P.L. 94-579, § 702, 90 Stat. 2787.

of the owner of the land" within the meaning of the statute.

In *United States* v. *Colorado Anthracite Co.,* 225 U.S. 219, 223, 56 L. Ed. 1063, 1065 (1912), this Court noted that by the decisions in *Hoffeld,* supra, and *Commonwealth Title,* supra, "it is settled that an assign, within the meaning of the act (21 Stat. 287), is one who becomes invested with the entryman's right in the land through some voluntary act of his.***"

The Department held, in effect, in 1892 that an assign within the meaning of 43 USC § 263 was "the one in whom title was vested at the date of the cancellation of the entry." *Adolph Emert,* 14 Land Dec. 101, 102 (1892).

This interpretation of 43 USC § 263 and 43 USC § 689 was contained in the regulations in effect at the time these entries were made (43 CFR § 217.39 (1963 Revision)), and in those in effect at the time the IBLA decision in this case was made (43 CFR § 1822.3-5 (a) (1974 Revision)). Those regulations stated that

> "Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law."

Those regulations recognize the effect of this Court's decision in *Commonwealth Title,* supra. See 43 CFR § 1822.3-6(a) (1) (1974 Revision).

43 USC § 263 and 43 USC § 689 are *in pari materia* with both § 324 and § 329, and the same interpretation of assign should be applied in construing all four statutes.

It is presumed that Congress in 1908 knew of the construction by the Court in *Hoffeld*, supra, and in *Commonwealth Title*, supra, and the construction therefore became a part of the law. See *Grover & B.S.M. Co.* v. *Forence S.M. Co.*, 85 U.S. 553, 21 L. Ed. 914 (1874); *Blake* v. *McKim*, 103 U.S. 336, 26 L. Ed. 563 (1881).

In Campbell v. Glover, 35 Land Dec. 474, 477 (1907), the Department stated that

> "***[T]he assignee of a desert land entryman, who for all purposes is the successor of the entryman, must be held to be entitled to the same rights and privileges with respect to the entry that the entryman himself might have been entitled to in the absence of an assignment.***"

And in *Young* v. *Trumble*, 35 Land Dec. 515 (1907), the Department, after noting the precedents established in *Hoffeld* and *Commonwealth Title* held, in effect, that an assignee is one who by voluntary act of the original entryman becomes entitled to make the further annual proofs and to receive patent for the land. 35 Land Dec. at 518.

That these rulings were known to Congress is indicated by the committee report on the bill that included § 324.[55] That report stated the purpose of the bill to be

[55]Senate Rep. No. 341, 60th Cong., 1st Sess. (1908).

to restrict "the right to receive an assignment to a qualified individual, so that both the assignee and the assignor have their rights to take and hold the land under the desert-land law extinguished by the transaction." Senate Rep. No. 341 at 1.

A report made two years earlier[56] noted that the result of an assignment was "the transfer of the entryman's claim", and that there was "practically no difference between an assignment in the case of a desert entry and a relinquishment with a transfer of improvements in the case of a homestead entry." Ibid at 3. That report also stated that "***if there is not some provision whereby rights acquired by an entryman may be transferred to another before proof, great hardship and loss are likely to result in many cases. It was evidently to meet just such contingencies that the assignment clause was provided and there can be no more valid objection to it than there is to the right of a homesteader to sell his improvements before making final proof. One who takes a desert entry and assigns is held to have had the benefit of the desert-land act and can not make another entry."

The decisions and regulations of the Department uniformly have interpreted an assignment as transferring the entire interest of the original entryman to the assignee. See, e.g., *Instructions*, 34 Land Dec. 29 (1905); *Regulations*, 37 Land Dec. 316, § 8 (1908); *Albert A. Bandy*, 41 Land Dec. 82 (1912); *Wallace S. Bingham*, 82 Int. Dec. 377 (1975); 43 CFR 2521.3(b) (1) (1975). In the case of *Michael H. Fallon*, 36 Land Dec.

[56]House Rep. No. 4896, 59th Cong., 1st Sess. (1906).

187 (1907), the Department noted that its uniform practice had been to treat entries made under the public land laws as entireties and that assignments of portions of desert land entries were prohibited, although the assignment of the whole was authorized. It further noted that the practice was well settled, and good administration demanded, that but one certificate should be issued upon a single entry. Ibid at 188.

The first regulations issued under § 324 stated that

> "The language of the act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment. The desert-land right is exhausted either by making an entry or by taking one by assignment." 37 Land Dec. 312, 316, § 15 (1908).

Those same regulations required, as do the current regulations, that as evidence of the assignment there should be transmitted to the BLM the original deed of assignment or a certified copy thereof, thus indicating an understanding that an assignment conveys the entryman's entire interest in the entry. See Regulations, 37 Land Dec. 312, 316, § 16 (1908); 43 CFR 2521.3 (c) (1) (1978 Revision).

The decisions of the Department have long recognized that a mortgage does not constitute an assignment of an entry unless it is foreclosed and sold at sheriff's sale under the decree of the court, and then the purchaser can be recognized only if he has the qualifications required of an original entryman. See, e.g., *Thomas E. Jeremy*, 24 Land Dec. 418 (1897).

Thus, it is obvious that Congress understood and intended assignments to constitute the transfer of an entryman's entire interest in the land and the decisions of the lower courts to the effect that the mortgages and leases constituted assignments are contrary to the statute and cannot be affirmed. There is nothing in the committee reports or in the limited congressional debate to indicate that Congress intended mortgagees before foreclosure sale or lessees to be included within the term "assigns" or that mortgages and leases were intended to be included in the term "assignments." The committee reports represent the considered and collective understanding of those congressmen involved in drafting and studying the proposed legislation. *Zuber* v. *Allen*, 396 U.S. 168, 186, 24 L. Ed. 2d 345, 356 (1969).

Our purpose in analyzing the meanings of assign and assignment is to show the type of transaction which Congress intended to include in the holding limitation of § 329, as revealed by application of the rule of ejusdem generis.[57]

Since the IBLA did not overrule the Administrative Law Judge's ruling that the transactions did not constitute assignments, the lower courts had no power or authority to confirm cancellation of the entries on the

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[57] The IBLA asserts that application of the rule of ejusdem generis would eliminate the word "otherwise" from the clause. On the contrary, application of that rule would include such transactions as executory contracts to convey after patent, which are not technically the same as assignments, but produce the same ultimate result, while the IBLA's interpretation would completely eliminate the necessity for the phrase "by assignment or otherwise." If every conceivable type of holding was intended, use of the word "hold" by itself would have accomplished that purpose. Congress obviously had some purpose in using the phrase "by assignment or otherwise."

basis of their findings that the transactions did constitute assignments. The reviewing courts must judge the propriety of administrative action solely on the grounds invoked by the agency. "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196, 91 L. Ed. 1995, 1999 (1946).

D. *Applying the IBLA's interpretation of 43 USC § 329 to these entries without publishing an appropriate regulation was an abuse of discretion and was in excess of statutory limitations on the Secretary's authority; the IBLA interpretation does not have the force and effect of law and the courts are not required to defer to that interpretation.*

The determination of what transactions fall within the holding limitation of § 329 cannot be accomplished on an ad hoc basis, but must be accomplished through the publication of substantive rules of general applicability and interpretations of general applicability formulated and adopted by the Department, and published in the Federal Register in accordance with the requirements of the Administrative Procedure Act, 5 USC § 552 (a) (1). *Morton* v. *Ruiz*, 415 U.S. 199, 232-236, 39 L. Ed. 2d 270, 292-295[58]. The IBLA presented

[58] 5 USC § 552 (a) (1) states in pertinent part: "Each Agency shall separately state and currently publish in the Federal Register for the guidance of the public —

* * *

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."

no reason why the requirements of the Administrative Procedure Act could not or should not have been met, by publication of an appropriate regulation. Cf. *Morton* v. *Ruiz*, supra, 415 U.S. at 235, 39 L. Ed. 2d at 294. Failure to publish regulations on mortgages and leasing embodying the IBLA's current interpretation of § 329 renders cancellation of the entries on the basis of that interpretation beyond the IBLA's statutory powers. *Morton* v. *Ruiz*, supra, 415 U.S. at 236, 39 L. Ed. 2d at 294-295.

The Court of Appeals recognized the violation of 5 USC § 552 (a) (1) in its original decision, but tempered that recognition when it amended the opinion in the order denying the petition for rehearing. The Court of Appeals declined to apply the publication requirement of 5 USC § 552, apparently because it felt that the publication requirement had effect only as part of the Petitioners' claim that the Government was equitably estopped from enforcing its interpretation of 43 USC § 329. See 593 F. 2d at 855; App. D, p. D-8. The Court of Appeals seems to be imposing a knowledge requirement on the Department's duty to publish regulations embodying its interpretation of the statute, but nothing in the Administrative Procedure Act seems to support such a position, and the Court of Appeals offered no explanation of its position. The Court of Appeals committed error by declining to require the Department to comply with the publication requirement of 5 USC § 552 (a) (1), and its ruling to that effect is in conflict with this Court's decision in *Morton* v. *Ruiz*, supra, and that of the Fourth Circuit in *Appalachian Power Co. v. Train*, 566 F. 2d 451 (1977).

The abuse of discretion which the District Court recognized, but the Court of Appeals did not, lies in the retroactive application of a new interpretation to past transactions against persons who did not know and had no reason to know that the holding limitation applied to mortgages and leases, without affording any opportunity to comply with the new interpretation. That abuse is aggravated by the unexplained failure to adhere to the long-established policy of the Department not to give retroactive effect to new interpretations, and by the fact that none of the statutes which create the Secretary's authority with regard to desert land entries confer upon him authority to give retroactive effect to his interpretations of the Desert Land Act.

The Court of Appeals committed error when it upheld retroactive application of the new interpretation of § 329 to enforce the harsh penalty of forfeiture against the entrymen. That aspect of the lower court's decision appears to be in conflict with decisions of this Court such as *Arizona Grocery Co.* v. *Atchison T. & S. F. R. Co.*, 284 U.S. 370 at 390, 76 L. Ed. 348 at 356 (1932), *NLRB* v. *Bell Aerospace Corporation*, 416 U.S. 267, 295, 40 L. Ed. 2d 134, 154 (1974), and *Helvering* v. *Griffiths*, 318 U.S. 371, 397-403, 87 L. Ed. 843, 860-864 (1943), and with the decision of the Seventh Circuit in *Briscoe* v. *Kusper*, 435 F. 2d 1046 (1970), and with the decision of the Fifth Circuit in *Anderson, Clayton & Co.* v. *United States*, 562 F. 2d 972 (1977). See, also, *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 116, 83 L. Ed. 536, 541-542 (1939).

It is significant that the IBLA made no effort to justify its departure from the long-established rule of giving only prospective effect to changed interpretations of the Desert Land Act.[59] This Court's decision in *Atchison T. & S. F. R. Co. v. Board of Trade*, 412 U.S. 800, 37 L. Ed. 350 (1973), requires that it do so.

The Petitioners were entitled to notice of the IBLA's interpretation of § 329 "sufficiently explicit to inform a reasonably prudent person of the legal consequences" of mortgages and leases of desert entry land. *Cf. Central Illinois Pub. Serv. Co. v. United States*, 435 U.S. 21, 38, 55 L. Ed. 2d 82, 95 (1978), concurring opinion of Mr. Justice Powell. This they did not receive. Instead, the notification received in the form of the decision in *Michener*, supra, told them that the arrangements did not violate § 324 or § 329. This principle was recognized and applied by the Department in *Raymond L. Gunderson*, 71 Int. Dec. 477, 484 (1964), in which the Department also acknowledged that the entryman's argument that his case should be governed by the policy that was being followed at the time of his relinquishment was well taken, and in *Wallace S. Bingham*, 82 Int. Dec. 377, 384 (1975). In *Gunderson*, supra, the Department stated

> * * * Until the Department provided by specific regulations that the word 'entry,' as used in the act * * *, included the filing of an allowable application for homestead entry, the meaning of the term 'entry' was not so clear as to warrant holding an applicant

[59] See, e.g., *David B. Dole*, 3 Land Dec. 214 (1884); *William Thompson*, 8 Land Dec. 104 (1889). Cf. *Mary R. Leonard*, 9 Land Dec. 189 (1889) and *Safarik* v. *Udall*, 304 F. 2d 944, 949 (CA-D.C. Cir., No., 1962).

accountable for understanding that the mere act of filing an allowable homestead entry application would exhaust his rights under the homestead law even if he should elect to withdraw the application before it was acted upon.* * *"

The absence of a regulation defining "wages" as including lunch expense reimbursements, for tax withholding purposes, was an important factor in this Court's decision in *Central Illinois Pub. Serv. Co.* v. *United States*, supra.

Other fators emphasized in *Central Illinois* are present in this case. In view of the existing regulations on mortgages and the Department's failure to issue regulations on leasing soon after § 329 was passed, or ever, and the 1964 interpretations in *Jensen*, supra, and *Michener*, supra, it is hardly reasonable to expect the Petitioners to "fill the gap" by determining that mortgages and leases are within the meaning of "hold". The IBLA's action is retroactive because it applies a new interpretation to past transactions, and it is highly punitive in view of the large expenditures on the irrigation system and on land development, little of which could be recovered if the entries are cancelled. The principles applied in *Central Illinois* should be applied to this case to determine that the Petitioners complied with § 329 as it was most reasonably interpreted in 1964 and that a more expansive interpretation adopted after the Petitioners had reclaimed, cultivated and irrigated the entries can not be applied retroactively to cancel the entries.

The IBLA's decision is based on the Secretary's earlier decision in *United States* v. *Shearman*, 73 Int. Dec. 386, 426 (1966), and the Solicitor's Opinion, Idaho Desert Land Entries — Indian Hill Group, 72 Int. Dec. 181 (1965). Neither was published in the Federal Register and the principles announced did not become "rules" which the Petitioners could be required to obey. See *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764-766, 22 L. Ed. 2d 709, 714-715 (1969). A ruling that the Petitioners were under no obligation to refrain from mortgaging and leasing the land in their entries is warranted because § 324 and § 329 did not mention or prohibit leases and mortgages, no regulation prohibits leases, 43 CFR 232.18 (d) authorizes mortgages, and no order was ever issued by the BLM requiring the Petitioners to cancel the arrangements the IBLA held to be unlawful. *NLRB* v. *Wyman-Gordon Co.*, supra, at 394 U.S. 766, 22 L. Ed. 2d 715.

The use of adjudication rather than rule-making constituted an abuse of discretion in this case because it was applied to past actions taken in good faith reliance on the Department's past decisions and policies and the BLM's approval of the mortgages and the lack of any regulations on leasing. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294-295, 40 L. Ed. 2d 134, 154 (1974).

In *Bell Aerospace*, supra, the Court noted that the NLRB did not specify in what instances the Board must resort to rule-making. Note 21 at 416 U.S. 290, 40 L. Ed. 2d 152. But here Congress has authorized the Secretary, or his designee, to enforce any part of Title 43 USC, by "appropriate regulations" where not

otherwise specifically provided for. 43 USC § 1201.[60] This Court held in *Smith* v. *United States*, 170 U.S. 372, 380-381, 42 L. Ed. 1074, 1077 (1898), that the decisions of the Secretary are not in any sense regulations under R.S. 161 (now 5 USC § 301). Nothing in the Desert Land Act contains specific, independent authorization for the Secretary to enforce the assignment clause or the holding limitation. Therefore, enforcement of the IBLA's interpretation of the holding limitation in the adjudicatory proceedings was beyond the Secretary's jurisdiction and authority, and the administrative cancellation of the entries was void and of no effect. This analysis is in accord with the commands of 5 USC § 558[61], Act of September 6, 1966, 80 Stat. 338.

This situation by no means hampers the Secretary in the execution and enforcement of the public land laws. He has but to issue appropriate regulations in order to activate the powers granted him by Congress.[62] The

[60] § 1201. The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for. Act of February 19, 1874, c. 30, 18 Stat. 16.

[61] § 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

* * *

[62] Any such regulation would have to be consistent with § 329, otherwise it would be a nullity. See, e.g., *United States* v. *Larionoff*, 431 U.S. 864, 873, 53 L. Ed. 2d 48, 56, (1977); *Manhattan General Equip. Co.* v. *Commissioner*, 297 U.S. 129, 134, 80 L. Ed. 528 (1936); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214, 47 L. Ed. 2d 668, 688 (1976). The interpretation embodied in the regulation must be consistent with the congressional purpose. *Morton* v. *Ruiz*, 415 U.S. 199, 237, 39 L. Ed. 2d 270, 295 (1974); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 38 L. Ed. 2d 287 (1973).

issuance of such regulations would in many cases, including this one, enhance the administration of the law.[63]

Nor does it limit the Secretary's power to interpret his own regulations in adjudicatory proceedings. The problem here is the absence of any regulations on leasing desert land entries. And to the extent the IBLA concluded that the mortgages somehow contributed to the "holding", its decision is clearly contrary to the plain language of the applicable regulation.[64]

The Secretary's authority under § 1201 is only administrative, not legislative. *United States* v. *George*, 228 U.S. 14, 57 L. Ed. 712 (1913). Any regulation issued by the Secretary would not, therefore, "have the force and effect of law", and the courts give to such interpretive regulations only such deference as is warranted by the timing and consistency of the agency's position, and the nature of its expertise. *Batterton* v. *Francis*, 432 U.S. 416, 425, 53 L. Ed. 2d 448, 456 (1977). The courts below suggested no reason why any greater deference should be accorded an administrative interpretation in adjudication proceedings, and they committed error by accepting the IBLA's interpretation without analyzing it in accordance with these standards.

[63] Cf. *Kelly* v. *United States Department of the Interior*, 339 F. Supp. 1095, 1102 (E.D. Ca., 1972); *Aiken* v. *Obledo*, 442 F. Supp. 628 (E.D. Ca., 1977).

[64] 43 CFR § 232.18 (d) (1963 Revision). App. E, p. E-14.

It should be noted that, although Sailor Creek filed copies of the mortgages pursuant to this regulation, the BLM did not name Sailor Creek as a party in the administrative proceedings and did not notify Sailor Creek that the mortgages were regarded as part of a mechanism for "holding" the entries.

The unexplained inconsistencies in the Department's recent interpretations of the holding limitation relieve the courts of any obligation to accord special weight to its views. Cf. *United Housing Foundation, Inc.* v. *Forman*, supra, 421 U.S. at 858, 44 L. Ed. 2d at 635-636.

Both the District Court and the Court of Appeals committed error in limiting the scope of review to determination of whether "the Secretary's decision is arbitrary or capricious or unsupportable by substantial evidence, considering the record is whole." App. d, p. D-5. That standard applies where Congress has expressly delegated to the agency the power to prescribe standards, and in such cases the regulations have "legislative" effect, which a reviewing court is not free to set aside simply because it would have interpreted the statute in a different manner. See *Batterton* v. *Francis*, 432 U.S. 416, 425, 53 L. Ed. 2d 448, 456 (1977). But the IBLA's decision in this case is not a legislative regulation, it is not even an interpretive regulation, it is merely an interpretive decision in an adjudicatory proceeding. This Court noted in *Batterton* v. *Francis*, supra, 432 U.S. at 425, 53 L. Ed. 456-457, note 9, that "A court is not required to give effect to an interpretive regulation." Where the only or principal dispute relates to the meaning of a statutory term, the controversy presents issues on which the courts, and not the administrators, are relatively more expert. See *Barlow* v. *Collins*, 397 U.S. 159, 166, 25 L. Ed 2d 192, 199 (1970). This Court has long held that a construction of law by the Land Department is not conclusive upon the courts. See *Wisconsin Central R. Co.* v. *For-*

sythe, 159 U.S. 46, 61, 40 L. Ed. 71, 76 (1895). These principles are in accordance with the scope of judicial review expressed in the Administrative Procedure Act, 5 USC § 706 (2) (A), (C) and (D), which require the reviewing court to hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * in excess of statutory jurisdiction, authority, or limitations, * * * (or) without observance of procedure required by law; * * *". The courts below committed error in limiting their review to the questions of whether the IBLA's decision is arbitrary or capricious or unsupportable by substantial evidence.

E. *If the transactions amounted to holdings by Sailor Creek in excess of 320 acres, that was not sufficient to warrant cancellation of the entries and forfeiture of the lands and moneys; the IBLA decision was inconsistent with long-established policies of the department.*

Because 43 USC § 1201 requires enforcement of the Desert Land Act through the publication of appropriate regulations, and because no regulation issued by the Department provides that a holding in excess of 320 acres of desert land constitutes "failure to comply with the requirements of the law", within the meaning of § 329, it is beyond the statutory authority of the IBLA to cancel these entries on the basis of its finding that Sailor Creek held more than 320 acres of desert land.

Regulations issued by the Department which were in effect when these entries were made and have been

in effect continuously since that time preclude the IBLA from cancelling these entries on the basis of its finding that Sailor Creek held more than 320 acres. 43 CFR § 232.17 (c) (1963 Revision) states that

> "* * *The assignment of a desert-land entry to one disqualified to acquire title under the desert-land law, and to whom, therefore, recognition of the assignment is refused by the manager, does not of itself render the entry fraudulent, but leaves the right thereto in the assignor. In such connection, however, see 42 L.D. 90 and 48 L.D. 519."

The reference to 48 L.D. 519 directs attention to the case of *Freeman* v. *Laxton* (1922), which was relied on by the District Court in allowing the entrymen to accomplish a divestiture of the holdings the IBLA determined to be in violation of § 329. *Freeman* invites the entryman to submit his transactions to the BLM, with the assurance that unauthorized transactions thus submitted will not jeopardize the entry.[65] The quoted regulation clearly contemplates that when a desert land entryman presents a transaction to the manager of the Land Office, the manager has a duty to determine whether the transaction constitutes an assignment and whether the assignee is qualified to take the assignment. If the assignee was not qualified, the manager simply would refuse to recognize the assignment and the right to the entry would remain in the original entryman. One common reason for refusing to recognize assignments is that the proposed assignee already has exhausted his right to a desert land entry. Under the interpretation adopted by the IBLA and by the Court of Appeals, a finding that a proposed assignee of a 320-acre entry previously had held any quantity of desert land under an entry of his own, would absolutely require cancellation of the entry because by virtue of the assignment, even though it had not been recognized or approved by the BLM, the assignee would be holding the entry by assignment and therefore in violation of the holding limitation. That would be contrary to the regulation.

If the leases and mortgages did result in a "holding" by Sailor Creek, that holding would not be of such an extensive interest as would result from an assignment, because by an assignment the entire interest of the entryman is transferred to the assignee. It is illogical and discriminatory that the BLM would not afford to entrymen attempting to transfer such lesser interests the same opportunity and procedure as is afforded to an entryman attempting to transfer his entire interest to another person. In other words, if the entrymen had attempted to sell the entries to Sailor Creek, they would have been accorded the rights and procedure established in 43 CFR § 232.17 (c), but since they only mortgaged and leased the entries, the IBLA has ruled

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[65] "The regulations governing the assignment of desert land entries contemplate that such assignments will be submitted to the General Land Office for adjudication as to the qualifications of the assignee and for recognition of the assignment.

"When this plan is pursued and it is found that the assignment cannot be recognized on account of the disqualification of the assignee, the assignment is disallowed and the title is considered as retained in the assignor. But where parties fail to submit the assignment to the General Land Office, they act at their own risk and if the fact of assignment is brought to the attention of the Land Department by contest alleging disqualification of the assignee, such charge constitutes sufficient ground for a contest and for cancellation of the entry if proven or in case of failure to make answer. See Watson v. Barney et al. (48 L.D. 308)." * * *" 48 Land Dec. at 520.

that they are not entitled to that procedure and protection.

The BLM violated its own regulation by not applying 43 CFR § 232.17 (c) to the transactions voluntarily submitted to it by the entrymen. It should not be permitted to cancel and forfeit the entries without first resorting to its own established procedure. *Morton* v. *Ruiz*, 415 U.S. 199, 39 L. Ed. 2d 270 (1974); *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 94 L. Ed. 393 (1950); *West* v. *United States*, 30 F. 2d 739 (CA-D.C., 1929).

If it be argued that this regulation applies only to absolute assignments, and not to transfers of lesser interests, then it should be held that the absence of any specific regulations on combinations of mortgages and leases shows that the Department has never regarded transactions of that type as being within the holding limitation. As stated in *The Atchison, Topeka & Santa Fe Railway Company* v. *Board of Trade*, 412 U.S. 800, 807, 37 L. Ed. 2d 350, 362 (1973) "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." See, also *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473, 59 L. Ed. 673, 680, 681 (1915); *Zemel* v. *Rusk*, 381 U.S. 1, 11, 14 L. Ed. 2d 179, 187 (1965); *Udall* v. *Tallman*, supra 380 U.S. at 17, 13 L. Ed. 2d, at 629.

The Court of Appeals committed error when it reversed the District Court's ruling that the rationale of the *Freeman* decision should be applied to these entries.

Certain policies adopted by the Department, which bind the IBLA under the rule established in *United States* v. *McDaniel*, supra, also preclude the IBLA from cancelling these entries on the basis of a finding that the transactions enabled Sailor Creek to hold more than 320 acres of desert entry land. Since 1884, if not before, it has been the consistent and uniform policy of the Department to apply changes in rulings and policies prospectively only, and not retrospectively. See *Miner* v. *Mariott*, 2 Land Dec. 709 (1884), in which the Department stated that even where a construction of a statute was clearly erroneous, "such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation." Id. at 711. The rule was applied to a desert entry in *David B. Dole*, 3 Land Dec. 214 (1884), and in other cases, including *William Thompson*, 8 Land Dec. 104 (1889), in which the Department also held that a desert entry was a contract between the Government and the entryman, controlled by the interpretation of the law in effect at the time the entry was made. The policy has received judicial recognition and approval. See, e.g., *Safarik* v. *Udall*, 304 F 2d 944, 959 (CA-D.C. Cir., 1962).

Several decisions rendered in the 1890's, the last apparently being *Heinzman* v. *LeTroadec's Heirs*, 28 Land Dec. 497 (1899), declined to cancel desert entries on the basis of excess holdings. In *Heinzman* one of the charges was that one of the parties "by his own entry and similar assignments held lands in excess of the amount allowed by law." Id. at 498. The Department held that the "assignment of a desert land entry to one

disqualified to acquire title under the Desert Land Law, does not render the entry fraudulent, but leaves the right thereto still in the entryman", and that "By the assignment * * * the integrity of the entry was not affected, and the right thereto still remains in the original entryman." Id. at 500. The policy expressed in these decisions presumably was approved by Congress when it modified the right of assignment by enacting § 324, without requiring that attempted assignments to disqualified persons would require cancellation of the entries. The policy was modified in two later decisions[66], but neither of those modifications apply to the facts in this case. The effect of these policies is to bar the IBLA from applying retroactively its new interpretation of the holding limitation and to bar the IBLA from using the asserted excess holdings as grounds for cancellation of the entries.

F. *The IBLA violated the Administrative Procedure Act and the regulations of the Department by disregarding uncontradicted evidence; the IBLA wrongly concluded that the government was not estopped from cancelling the entries.*

From an administrative record consisting of more than 5,000 pages of testimony and hundreds of documents, the IBLA extracted a single statement in one Government exhibit as the sole support for its finding that the BLM did not have knowledge that the entrymen had leased their entries. That statement appears in a letter sent by the Manager of the Land Office to

[66] *Bone* v. *Rockwood*, 38 Land Dec. 253 (1909); *Freeman* v. *Laxton*, supra.

each entryman, shortly after final proof, in which it was observed that

> "In addition to the Sailor Creek Water Company furnishing water to your entry, this Bureau notes that the lands in your entry are actually being developed and farmed by the same company. There is nothing of record with this office that shows such contractual arrangements.* * * "[67]

The statement itself is equivocal as to the existence or absence of knowledge on the part of the Government. All the statement really says is that the Land Office did not have copies of the leases, and that is by no means the same as saying that the BLM did not know, from discussions by its representatives and agents or from copies furnished to other offices, about the terms of the leases. But when considered with other uncontradicted evidence in the record, as must

[67] A copy of the letter is in evidence as Exhibit G-2 Doc. 33, which reads in pertinent part as follows:

"This office has recently reviewed all the information, including final proof papers, you have submitted leading toward patent of the land in your desert land entry. The documents of record include a 'Notice of Mortgage' and a 'Water Right Document' including 'Exhibit A' which is a real estate mortgage with the Sailor Creek Water Company for construction of an irrigation system. These contractural documents are to furnish water to the land of your entry and also to provide security to the company.

"In addition to the Sailor Creek Water Company furnishing water to your entry, this Bureau notes that the lands in your entry are actually being developed and farmed by the same company. There is nothing of record with this office that shows such contractual arrangements. In order for us to complete action on your application for patent, it will be necessary that you furnish this office with copies of the contractual arrangements you have made with the party or parties actually doing the developing and farming of the land in your entry. Please furnish this information at the earliest possible date.

Very truly yours,
/s/ Orval G. Hadley
Acting Land Office Manager"

be done by the statutory command of 5 USC § 556 (d) (Act of September 6, 1966, 80 Stat. 386), by this Court's decision in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488, 95 L. Ed. 456, 467 (1951), and by the Department's own regulation, 43 CFR § 4.478 (a) [68] it becomes clear that the IBLA's conclusion is contrary to the "reliable, probative and substantial evidence", which its own regulation requires as a basis of decision. This conclusion disregarded the uncontradicted testimony of two witnesses, Allen Noble and G. Patrick Morris, without any explanation and without any finding that there was a lack of credibility on the part of these witnesses. The Administrative Law Judge, who observed them on the witness stand, relied on their testimony in making his findings. Neither was there any indication by the IBLA that the testimony of Noble and Morris was inherently improbable. Under these circumstances, the IBLA's rejection of this important, uncontradicted testimony concerning the knowledge possessed by the agents and representatives of the BLM is arbitrary and not justified. The contrary ruling by the Court of Appeals conflicts with this Court's decision in *Universal Camera Corp.* v. *NLRB*, supra, 340 U.S. at 496-497, 95 L. Ed. at 471-472, and with the decisions of the First Circuit in *Stone & Webster Engineering Corp.* v. *NLRB*, 536 F. 2d 461

[68] § 4.478 Conditions of decision action.

(a) *Record as basis of decision; definition of record.* No decision shall be rendered except on consideration of the whole record or such portions thereof as may be cited by any party or by the State Director and as supported by and in accordance with the reliable, probative, and substantial evidence. The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, shall constitute the exclusive record for decision.

(1976), and that of the Sixth Circuit in *NLRB* v. *Cleveland Trust Co.*, 214 F. 2d 95 (1954), and with its own decisions in *Day* v. *Weinberger*, 522 F. 2d 1154 (1975), and *Charlestone Stone Products Co., Inc.* v. *Andrus*, 553 F. 2d 1201 (1977), reversed on other grounds, *Andrus* v. *Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 56 L. Ed. 2d 570 (1978).

The IBLA's finding cannot be affirmed simply by isolating a specific quantum of supporting evidence, cf. *Universal Camera Corp.* v. *NLRB*, supra, *Day* v. *Weinberger*, supra at 552 F. 2d 1156, particularly in light of the long-standing policy of the Department of the Interior to the effect that in forfeiture cases the determination leading to a forfeiture must be based on a clear preponderance of the evidence. See, e.g., *Tibergheim* v. *Spellner*, 6 Land Dec. 483, 485 (1888).

The Court of Appeals declined to find that the recording of the leases constituted constructive notice to the BLM of the actual provisions of the leases.[69] On that point the decision of the Court of Appeals is in direct conflict with the decision by the Tenth Circuit in *United States* v. *Christopher*, 71 F 2d 764 (1934).

In *Adolph Coors Company* v. *FTC*, 497 F. 2d 1178, 1184 (1974), the Tenth Circuit held that the agency must consider the initial decision of the Law Judge and the evidence in the record on which it was based, and that when the Law Judge and the agency reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience, fol-

[69] The point was raised in Brief of Plaintiffs - Cross - Appellants at 45.

lowing this Court's holding in *Universal Camera Corp* v. *NLRB*, supra, 340 U.S. at 496, 95 L. Ed. at 472. The effect of the ruling of the court of Appeals in this case is that the findings of the IBLA are entitled to recognition over those of the Law Judge, without reviewing the Law Judge's findings and without giving them any consideration on appeal. That ruling is in direct conflict with this Court's ruling in *Universal Camera Corp.* v. *NLRB*, supra, and with the Tenth Circuit's ruling in *Adolph Coors Company*, supra.

The rejection of the evidence presented by the testimony of Noble and Morris without a detailed explanation of the reasons for such rejection was arbitrary. *White Glove Building Maintenance, Inc.* v. *Brennan*, 518 F. 2d 1271, 1276 (CA-9th Cir., 1975).

Proper consideration of the evidence on which the Administrative Law Judge based his findings that the BLM knew that the entrymen intended to have their entries farmed by a single entity and that they intended to obtain 100% financing, can only lead to the conclusion that those findings were supported by substantial evidence and should not have been rejected or disregarded by the IBLA and by the Court of Appeals. The knowledge shown by that evidence is sufficient to estop the IBLA from applying its interpretation of § 329 to these entries. And in addition to the basis of estoppel stated by the District Court, the BLM, by allowing the applications for these entries with knowledge of the plans for leasing and financing, thereby setting in motion the machinery for expenditure of hundreds of thousands of dollars of private funds in

construction of the irrigation system and development of the lands in the entries, without issuing any regulation, decision or direct communicaton indicating to the entrymen or to Sailor Creek that leases and mortgages would violate § 329, can not be permitted at this late date to establish that new interpretation as grounds for forfeitures which result in a tremendous windfall gain to the Government.

Under similar circumstances this Court held in *United States* v. *Bank of the Metropolis*, 15 Peters 377, 395-398, 10 L. Ed. 774, 781 (1841), that the Government could not use facts which already had happened to exempt itself from liability on the basis of a condition which it could have expressed, but did not.

G. *Upon filing applications for entry the entrymen became vested with the right to have the entries processed in accordance with the policies and regulations in effect at that time.*

There are two types of vesting of rights which occur with respect to a desert land entry. The first type occurs when the applicant files an allowable application and pays the downpayment of twenty-five cents per acre. In the case of *Raymond L. Gunderson*, 71 Int. Dec. 477, decided December 2, 1964, less than six months after final proof and final payment were made on these entries, the Department held that all the rights of an entryman under the public land laws vest in an applicant upon the filing of his application, if the application subsequently is found to be allowable, and that those vested rights include the right to have the entry processed in accordance with the policies and

regulations in effect at the time the application was made. Id. at 483-484. The *Gunderson* case involved a homestead entry, but the decision relied heavily on previous decisions and regulations under the Desert Land Act, and indicated that the same rules and policies should be applied to both types of entries. The ultimate ruling in *Gunderson* was that the amended homestead regulation at issue in that case should be applied only to allowable homestead applications filed *after* the effective date of the amendment to the regulation. Id. at 484.

The same analysis of the rights of a purchaser under the public land laws was made in *James* v. *Germania Iron Co.*, 107 F. 597, 602 (CA-8th Cir., 1901), in which the Court stated

> "* * * The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by the laws of the land and the rules and practice of the department on that day, and no subsequent rules, decisions, or practice could devest them of the property they then secured, or deprive them of their equitable or legal rights to the title to the land which they then acquired. Cornelius v. Kessel, 128 U.S. 456, 461, 9 Sup. Ct. 122, 32 L. Ed. 482; Shreve v. Cheesman, 69 Fed. 785, 792, 16 C.C.A. 413, 419, 32 U.S. App. 679, 689.* * *"

The decision of the Court of Appeals in this case is in direct conflict with the decision of the Eighth Circuit in *James*, supra.

Applying these rules to this case means that the Secretary's interpretation of § 329 in *Shearman*, supra,

and the IBLA's interpretation in this case, should be applied only to desert land entries for which application was filed after the effective date of the decision.[70] In *Gunderson* the Department also reiterated and applied the long-standing policy of the Department to the effect that a desert land entry is governed and controlled by the regulations and interpretations in effect at the time the entry is made by filing the application. Those same principles should have been applied to these entries. The IBLA offered no explanation for the failure to apply that policy to these entries, nor did it attempt to distinguish the *Gunderson* decision or offer any explanation of why the rights of the entrymen did not vest at the time their applications were filed.

In arriving at its decision in *Gunderson*, supra, the Department discussed and applied several decisions of this Court, including *Payne* v. *Central Pacific Railway Co.*, 255 U.S. 228, 65 L. Ed. 598 (1921), and *Payne* v. *State of New Mexico*, 255 U.S. 360, 65 L. Ed. 680.

The decision in *Gunderson* conformed to the policy adopted at least 80 years earlier in connection with desert land cases in the case of *David B. Dole*, 3 Land Dec. 214 (1884), in which the Secretary stated "I do not understand that a party acts under a misapprehension of the law, so as to lose any right, when he acts under its official interpretation," and that entrymen and their assignees acting under such official interpretation "should not be required to forfeit any right by

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[70] Applications for these entries were filed two and one-half years or more before the *Shearman* decision.

subsequent construction inconsistent with the first." Id. at 215.

This policy presumably was known to Congress when it enacted § 329, and since Congress did not direct otherwise, the policy should be considered as having been adopted by Congress as an implied part of § 329. At the very least, it should be presumed that the intent of Congress was being carried out by adhering to the settled rule of giving only prospective effect to changed rulings or to new interpretations, and the IBLA had a duty to explain its "departure from the prior norms." *Atchison, T. & S. F. R. Co.* v. *Board of Trade*, supra, 412 U.S. at 807-808, 37 L. Ed. 2d at 362. This requirement applies with equal force to the other changes in policy involved in this case, none of which were explained by the IBLA.

The other type of vested interests arises when the entryman fulfills the statutory requirements and makes final proof and final payment.[71] As recognized by the Department in *Gunderson*, supra, and as stated by this Court in *Wyoming* v. *United States*, 255 U.S. 489, 497-498, 65 L. Ed. 742, 746 (1921),

> "When the price is paid, the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay in the mere administration of affairs does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." (Quoting from Benson Mining & Smelting Co. v. Alta Mining and Smelting Co., 145 U.S. 428, 431, 36 L. Ed. 762, 764 (1892)).

[71]The IBLA did not disturb the Law Judge's findings that satisfactory final proof had been made and the final payment had been made. App. A, pp. A-17 and A-42.

And the Court also held that when all the conditions of entry had been performed and the price had been paid, "the full equitable title has passed, and only the naked legal title remains in the government, in trust for the other party, in whom are vested all the rights and obligations of ownership." Id. at 255 U.S. 498, 65 L. Ed. 746. It is significant that these cases hold that no additional burdens can be cast on the purchaser and that there are vested in him all the rights and obligations of ownership. These decisions can only mean that subsequent to final proof and final payment, and probably from the time of filing the application and paying the initial twenty-five cents per acre, no additional requirements and limitations can be imposed upon a desert land entryman. The IBLA committed error when it attempted to impose its interpretation of the holding limitation on these entries nearly eleven years after final proof was made. The Court of Appeals committed error when it ruled that the rights of the entrymen had not vested.

In *State of Wisconsin et al*, 65 Int. Dec. 265 (1958), the Department discussed *Wyoming* v. *United States*, supra, and other cases, in arriving at the conclusion that after an entryman has done all that is required of him under a particular statute and has earned equitable title to a tract of public land, the Secretary can vacate the disposal and refuse to issue patent only for

proper grounds existing prior to or up to the time equitable title was earned.

It is not entirely clear from the IBLA's decision whether it regarded the holding by Sailor Creek as existing as soon as the sublease was made or as existing only when the leases had been assigned to Sailor Creek by Morris and Noble. However, since the assignments of the leases were discussed in some detail, App. B, pp. B-9-10, and the IBLA noted that

> "By 1965 the Sailor Creek Water Company had a mortgage on all the entries, had leases with an eleven year possible life, had absolute authority to determine what would or would not be grown, oversaw all the planting and harvesting operations, and retained all profits derived from these operations",

it should be assumed that the IBLA regarded the assignments of the leases as an operative part of the "totality of the arrangements," which would mean that the asserted "holding" by Sailor Creek did not occur until 1965, more than six months after final proof was made on these entries. Therefore, the entries come within the rule stated in *State of Wisconsin*, supra, and the entrymen's right to patent vested at the time of final proof, if not before, and that right could not be affected by the assignment transactions between Morris and Noble and Sailor Creek Water Company which occurred after final proof. The IBLA offered no reason why the rule in *State of Wisconsin* should not be applied to these entries. That rule encourages fair dealing between the Government and the citizen, and it

should not be disregarded or avoided unless compelling reasons exist.

The rule adopted in *State of Wisconsin*, supra, is recognized in the regulation of the Department[72] which states that "After final proof and payment have been made the land may be sold and conveyed to another person without the approval of the Bureau of Land Management", with the caveat that such conveyances are subject to the superior rights of the United States and that the title would fall if it should be finally determined that the entry was illegal or that the entryman had failed to comply with the law. But the caveat can only be intended to apply to matters occurring before final proof and final payment, as indicated by the wording of the regulation and by the fact that the regulation clearly recognizes the right to make the sale without regard to whether the purchaser is a qualified entryman or not, so that a sale after final proof to a disqualified person could not be asserted as grounds for cancellation of the entry, even though a sale-assignment before final proof could, under certain circumstances, result in cancellation of the entry. See *Freeman* v. *Laxton*, supra. This regulation binds the IBLA. *Morton* v. *Ruiz*, supra; *Chapman* v. *Sheridan-Wyoming Coal Co.*, supra.

In *Lemon* v. *Kurtzman*, 411 U.S. 192, 199, 36 L. Ed. 2d 151, 160 (1973), this Court recognized that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins

[72] 43 CFR 2226.1-3 (a) (1964 Supplement).

our modern doctrines recognizing a doctrine of nonretroactivity. Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none."

Retroactive application of the new interpretation of § 329 raises a serious question of due process, which has not been decided by the Court of Appeals or by the District Court, and Petitioners raise the question here only to protect the issue should the decision of the Court of Appeals be regarded as final for all purposes. But aside from the constitutional implications of retroactive application of the new interpretation, the quoted statement from *Lemon*, supra, and related principles stated in *Linkletter* v. *Walker*, 381 U.S. 618, 14 L. Ed. 2d 601 (1965), and cases cited in *Linkletter* at 381 U.S. 624-628, 14 L. Ed. 2d 605-607, should be applied to this case.

The IBLA should have been guided by the principles discussed by this Court in *Lemon* v. *Kurtzman*, supra, to look to the prior history and purpose of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. 411 U.S. at 199, 36 L. Ed. 2d at 161. The determination of whether retroactive application is necessary, or even permissible, is an equitable consideration, and "it is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." *Lemon*, supra, at 411 U.S. 203, 36 L. Ed. 2d at 163. Petitioners were entitled to rely on the absence of regulations or decisions on leasing desert land entries,

and on the lack of any objection from BLM officials and representatives when the plans for leasing were discussed prior to allowance of the entries, and on the regulations permitting mortgages and the BLM's approval of these mortgages, when they accepted the Government's statutory offer and proceeded to expend large sums of money in construction of the irrigation system and development of the land for farming purposes.

Under these principles, the IBLA abused its discretion and exceeded the Secretary's statutory authority by retroactively applying the new interpretation of § 329 to these entries.

The District Court correctly concluded that the equities weighed heavily in favor of the entrymen, and its findings in that regard were not disturbed by the opinion of the Court of Appeals. If the interpretation contended for by the Petitioners is applied, no direct damage results to the Government. If the IBLA's interpretation is correct, it can be applied to all future desert land entries. In *A. M. Shaffer*, 73 Int. Dec. 293 (1966), the Department stated that "the regulations should be so clear that there is no basis for the applicant's noncompliance, and if there is doubt as to their meaning and intent such doubt should be resolved favorably to the applicants." Id. at 298. "* * * If it is felt that the practice followed by the appellants is objectionable, the regulations should be amended to make the offerors' obligation clear." Id. at 301.

By failing to apply the rule stated in *Shaffer*, supra, the IBLA disregarded yet another established policy of

the Department in arriving at its decision in this case. That policy was established at least as early as 1955 in the case of *Madison Oils, Inc.*, 62 Int. Dec. 478, 483. The IBLA's failure to apply that policy to these entries was arbitrary and capricious action, discriminating against these entrymen, just as was its failure to apply other long-established policies of the Department.

H. *The issues on denial of due process, application of contract law and dismissal for inadequate pleadings should have been decided in favor of the petitioners.*

Neither the District Court nor the Court of Appeals discussed or ruled on the issues of denial of due process, application of contract law to these entries, or inadequacy of the contest pleadings under the Administrative Procedure Act and the regulations and decisions of the Department. On the authority of *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 83 L. Ed. 1184 (1939), and *Hansen & Rowland* v. *C. F. Lytle Co., Inc.*, 167 F. 2d 998 (CA-9th Cir., 1948), and *Union Pacific R. Co.* v. *Johnson*, 249 F. 2d 674 (CA-9th Cir., 1957), those issues should remain before the District Court for determination, if this Court denies this petition or affirms the decision of the Court of Appeals. These issues are mentioned here only to preserve them should the decision of the Court of Appeals be regarded as final for all purposes.

CONCLUSION

For the reasons herein stated, this Petition should be granted, and the judgment and decision of the Court of Appeals should be reversed, and the judgment and decision of the District Court should be reversed insofar as it affirms the decision of the IBLA.

Respectfully submitted,

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APPENDICES

APPENDIX A

DECISION OF THE
ADMINISTRATIVE LAW JUDGE
(Dated January 29, 1971)

UNITED STATES OF AMERICA,	)	
Contestant	)	
vs.	)	
	)	
G. PATRICK MORRIS, JOAN E.	)	IDAHO
ROTH, ELISE L NEELEY,	)	013820,
LYLE D. ROTH, VERA M. NOBLE,	)	013905,
CHARLENE S. BALTZOR,	)	013906,
GEORGE R. BALTZOR, JOHN E.	)	013907,
MORRIS, JUANITA M. MORRIS,	)	014126,
NELLIE MAE MORRIS, MILO	)	014128,
AXELSEN, PEGGY M. AXELSEN,	)	014129,
Contestees	)	014130,
	)	014249,
FARM DEVELOPMENT	)	014250,
CORPORATION,	)	014251,
Intervenor	)	014252
	)	Desert Land
	)	Entries

STATEMENT OF THE CASE

These proceedings involve a group of 12 desert land entries situated on 3,781.62 acres of public land adjacent to the south bank of the Snake River near Glenns Ferry in Elmore County, Idaho. The entrymen filed final proof papers in May 1964. The contests were initiated in June 1966 by the Idaho Land Office Man-

ager, Bureau of Land Management, who filed separate complaints against each entry. Answers making general denials were filed by the entrymen.

Since the entries were developed as a group and the charges set forth in Paragraph V of the complaints are identical in each case, they were combined for hearing and decision.

A prehearing conference was held, in Boise, Idaho, on April 4, 1967. The hearing, which involved 38 days of testimony, commenced on June 26, 1967, and adjourned on August 1, 1968, with sessions being held in Boise, Idaho, and San Francisco, California. The Government was represented by Messrs. William Burpee, Riley C. Nichols and Robert S. Burr, Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho. Messrs. William F. Ringert of Boise, Idaho, and Milo Axelsen of Nampa, Idaho, represented the Contestees. Mr. Ringert also represented the Intervenor.

The final brief was filed on September 2, 1969.

FINDINGS OF FACT

I. INTITIAL FILINGS

On January 1963, G. Patrick Morris and his wife, Juanita M. Morris, Robert S. Skyles and his wife, Charlotte M. Skyles, Calvin B. Neeley and his wife, Margaret J. Neeley, each filed a desert land entry application on land in the area of Sailor Creek near Glenns Ferry, Idaho. The initial filing fee for all six applicants was remitted to the Bureau of Land Management by Mr. Skyles. Accompanying the applications were receipts for individual water permits issued to each applicant by the Department of Reclamation of the State of Idaho and a statement that the applicants intended to cooperate in the construction of an irrigation system to furnish water from the Snake River for all six entries.

On or before Feburary 21, 1963, Lyle D.Roth and his wife, Joan E. Roth, Nellie Mae Morris and Elise L. Neeley also filed applications for desert land entries in the same area (Ex. G-84). G. Patrick Morris, acting as their agent, assisted in the preparation of the applications and remitted the fees to the Bureau (Exs. G-2, G-3, G-4; Tr. Vol. 12, p. 1864). The applications were accompanied by receipts for individual water permits and a schematic layout of a proposed high lift irrigation system designed to deliver water from the Snake River to their entries and to the entries of the first six applicants.

In March or April of 1963, through the persuasion of G. Patrick Morris, Allen T. Noble became interested in the Sailor Creek entries and he and Morris agreed to join efforts as a partnership to develop the entire project (Tr. Vol. 19, pp. 2911-2915). It was about this time that Neeley and Skyles withdrew as active participants in the efforts to obtain financing.

Of the six applications that were filed January 1963, the only entry that was later allowed was that of G. Patrick Morris. The status of the Skyles and Neeley entries is not certain as the record is silent. They may have been relinquished or they may be pending allowance.

Eight new applications for entry were filed by May 6, 1963. The applicants were: Vera N. Noble, John and Lucy Noble, John E. Morris, Keith and Della Jane Taylor, and George R. and Charlene S. Baltzor. The fees were paid by Allen T. Noble, and he and G. Patrick Morris assisted in the preparation of the applications and exhibits and acted as agents for the applicants in applying to the State for water permits. In these applications, the source of water was shown as "Sailor Creek Company" with a plan proposed for a row-crop farming operation. At this stage, the project comprised 18 applications embracing 5,760 acres of land.

The applications for John and Lucy Noble and Keith and Della Jane Taylor were subsequently relinquished and are not involved in these procedings.

On June 14, 1963, Milo and Peggy M. Axelsen each filed applications for desert land entries at Sailor Creek. On the same date, Nellie Mae Morris and Juanita M. Morris relinquished their earlier applications and filed new applications covering the entries now in issue.

II. DEVELOPMENT OF THE ENTRIES AND FINANCING

Soon after the first six applications had been filed, Morris began his attempt to obtain "mortage money" to develop what is now referred to as the Sailor Creek Project. From the outset,the applicants intended to finance the entire operation with borrowed capital (Tr. Vol. 3, pp. 457-458; pp. 1032 and 1034). Since the main expense would be the construction of a high lift irriga-

tion system to pump water from the Snake River, Morris first contacted the FHA, the Small Project Loans Division of the Bureau of Reclamation, Traveler's Insurance Company, and W. R. Ames Company (Tr. Vol. 7, pp. 1031 1101-1103). After Allen Noble became interested in the project, he contacted Farm Development Corporation who had built and financed an irrigation system for him in the Dry Lake area. On May 17, 1963, Morris wrote to Mr. B G. Miller (an officer of Hale Brothers Associates, a parent corporation of Farmland-Idaho and Hiller Engineering Corporation) presenting a proposal to irrigate 6,160 acres of desert land, which comprised the 18 desert land entries plus 400 acres that Morris had asked the State of Idaho to put up for sale in section 16, Township 6 South, Range 9 East. In the presentation, Morris estimated a total cost of $1,990,340 which included a water distribution system, labor camp, roads, wells, sheds, bridge and a $21,600 item for "payment to Skyles and Neeley." This last item raises an inference that Morris was proposing that Skyles and Neeley be paid for relinquishing their entries. There is, however, no evidence that such payment was ever made.

On May 20, 1963, Mr. Miller met with Morris and Noble to discuss the development. The meeting resulted in an informal agreement in which Hale Brothers Associates, through their subsidiaries Farmland-Idaho, Inc., and Hiller Engineering Corporation, would finance 100 percent of the cost of development of the proposed Sailor Creek Project (Tr. Vol. 4, pp. 583-584; Vol. 9, pp. 2916-2921; Vol. 11, pp. 3136-3148; Exs. G-149, A-14).

Mr. Miller and Noble then contacted Harley McDowell (doing business as Idaho Land and Appraisal Service) and hired him to prepare a feasibility report (Tr. Vol. 37, p. 5769).

On May 21, 1963, Morris and Miller met with Mr. Ringert to discuss the legal implications of the proposal. It was proposed that Morris and Noble would farm or supervise the farming of the entries; that Farmland-Idaho and Hiller Engineering Corporation would construct the main irrigation system and finance the development of the project; and that McDowell's office would prepare the feasibility work, the handling of the applications and the final proof taking. During the discussion Mr. Miller asked if the companies he represented, or either of them, could acquire the land. He was advised by Mr. Ringert "that he could just as well forget about that until the entrymen had patent and then see if he could make a deal with them, if he wanted to at that time" (Tr. Vol. 22, pp. 5819-5820). Mr. Ringert was retained by Hale Brothers to investigate the formation of either a joint venture or a corporation to carry on the proposed plans (Tr. Vol. 22, p. 3416; Ex. G-150, Doc. U-34).

On May 28, 1963, Mr. Ringert wrote to Mr. Miller as follows:

> From our telephone conversation of yesterday morning, it is my understanding that the various parties who have filed application for desert land entries on lands in the Saylor [sic] Creek Project are agreeable to your offer to conduct water from Snake River to the property lines of the various entries at a total

> price of $189.00 per acre, and that the irrigation system will be constructed by a private water corporation with whom the entrymen will contract for their water rights. It is also my understanding that the water corporation will obtain firm commitments for long term loans to the entrymen on terms agreeable to the entrymen and that the entrymen will agree to borrow funds from the lending institution which makes the commitments, the loan proceeds to be applied directly to payment of the water right contracts. The entrymen also will agree to mortage their desert land entries to secure such loans and will agree to exercise best efforts promptly to obtain patent to the lands upon which entry is made.
>
> It is also my understand [sic] that several of the entries are to be leased to Allen Noble during the period in which the entries are being developed and made ready for final proof, under a lease agreement whereby the various entrymen shall be entitled to a fair and equitable portion of the net returns from the crops produced on the entries.
>
> The foregoing should of course be contingent, as to each entry, upon the application for the entry being allowed by the Bureau of Land Management . . . . (Ex. G-150, Doc. U-39).

The joint venture, composed of Hiller Engineering Corporation and Farmland-Idaho, Inc., was formally created by written agreement on July 5, 1963, and was named "Sailor Creek Water Company" (Ex. G-80, File I, Doc. 14, *et seq.*). Each entryman and the water company then entered into water right contracts in which

the company agreed to construct and operate the main irrigation system for delivery of water and the entryman agreed to pay a specified amount of money for the water rights.

Payment of the purchase price of the water right contracts was secured by mortgages on each entry. The mortgages secured only the deferred installments of the purchase price and included a clause in which the mortgagee (water company) agreed to waive any right to deficiency judgment in the event of foreclosure. This latter provision was made as a result of a specific request by John E. Morris (Tr. Vol. 15, pp. 2285 through 2287). Copies of the water right contracts and mortgages were included in the feasibility report submitted to the Bureau of Land Management on July 12, 1963, by Idaho Land Appraisal Service in support of the applications for the 12 entries later allowed and now in issue (Ex. G-80, Files 1, 2 and 3). Sailor Creek Water Company paid the cost of the feasibility report.

Sometime prior to August 1963, G. Patrick Morris decided to attend school in Chicago. Before leaving Idaho he made an arrangement with Sailor Creek Water Company to provide him a fixed monthly sum for one year to be repaid from his "equity in the water company" (Tr. Vol. 27, p. 4154; Ex. G-150, Doc. U-66). On August 5, 1963, he was reimbursed $1,438.90 for the expenses he incurred in connection with the project and for his past work (Ex. G-149, Doc. H-25; Tr. Vol. 22, p. 3371). Of this amount, $1,300 was compensation to him for the time he had spent working on the Sailor Creek matters prior to July 26, 1963.

Pursuant to Morris' agreement, he received 12 payments of $400 each. On the corporate books the payments were first treated as "compensation." Later, an agreement was prepared and signed by Morris which provided that the $400 monthly checks were to be repaid from his equity in the Sailor Creek Water Company

Noble also entered into an employment agreement, dated August 10, 1963, with the joint venture in which he was to act as a field manager for construction and management of the proposed water system at a monthly salary of $1,000 (Ex. C-CH).

On August 30, 1963, the Bureau of Land Management recognized Sailor Creek Water Company as a source of water supply for the 12 proposed land entries which are now in issue, involving a total of 3,789.62 acres in the area of Township 6 South, Range 9 East, Boise meridian, Idaho (Ex. G-80, File 3, Doc. 9).

On August 30, 1963, Mr. Miller wrote a memorandum for inclusion in the Sailor Creek Water Company file summarizing the situation as it then existed. The portions of the memorandum which reveal the intent of the company at this phase of the project follows:

From: B .G. Miller

The Sailor Creek Water Co. has been formed as a joint venture by two of our wholly-owned subsidiaries, Hiller Engineering Corp. and Farmland-Idaho, Inc. At the outset, the Water Company will build an irrigation system to provide water from the Snake River to 3700 acres of desert entry land in

Elmore County, Idaho. There are another 10-12,000 acres of land adjacent to the project which are susceptible to the same treatment as the first 3700 acres. The Water Company will continue to supply water to the land as well as to acquire land and actively farm land for its own account. Allen Noble and Pat Morris will be admitted as one-third owners each.

Desert entry is a right available to each resident of a state which permits him to file upon up to 320 acres of U. S. owned desert land when he can show that it is economically and agriculturally feasible to bring water to the land and to cultivate it for "higher use". When the entry is "allowed" (i.e. feasibility theoretically demonstrated), the entryman has as many as nine years (including renewal) to bring ⅛th of his entry into crop. When he has done so, the U. S. Bureau of Land Management will issue him a patent granting fee title to him for the entire entry.

It is important to note that, in the interval between "allowance" and patent, the entryman may treat the land exactly as if title vested in him, except that he cannot make any undertaking in this period to sell the developed land. He may mortgage it, however, and the mortgage is enforceable against the land in the interval before patent as well as after patenting. However, if foreclosure occurs before patent issues, the successful bidder must be a qualified entryman.

In May of this year, G. Patrick Morris and Allen Noble approached Farmland as well as Ames to go

into partnership in the development of desert entries filed by them, members of their families, and personal friends. Our proposal to them was more acceptable than our competitors', and we began detailed planning of the development. Both Morris and Noble believe that these lands should be under common management and possibly, at a later date, common ownership. The intent of the Desert Entry legislation, however, precludes any person or entity from rights to more than one entry. While I am confident that Morris and Noble are genuine in their belief that, when the land proves and is patented, they will be able to buy the land at a modest price because of their close relationships with the entrymen, it seemed prudent to plan that this might not happen. Good faith can weaken markedly when a dollar sign gets far enough to the left of the decimal point.

For this reason, the original partnership idea was shelved and the joint venture was used. Farmland and Hiller have each agreed to contribute $25,000 to their capital accounts in the venture and stand ready to cause HBA to lend as much as $175,000 to it (a total of $225,000 as discussed by the HBA Board). When, as, and if Morris and Noble each contribute two sections of land (1280 acres), more or less, to the venture, they will be entitled to a one third interest apiece.

Since we can't have a binding agreement as to the land contribution by Noble and Morris, they wanted some assurances as to their participation. I have

agreed that their assignment of the leases to all 3700 acres to the Company will be consideration for ½ of their stock, when we incorporate, if ever.

The Water Company sold each entryman a water contract in which the entryman agrees to buy, and the water company agrees to supply, irrigation water. The entrymen assigned their water permits to the Water Company and secured their obligations to the Company on the contract by the first real mortgage on their entries. Aside from normal boilerplate, these mortgages also provide:

1. The entryman will diligently, and in a timely manner, farm the entry or cause it to be farmed.
2. He will diligently pursue the issuance of the patent.
3. He will not refinance the contract without prior written approval from the Water Company.
4. In the event of default of the entryman under 1 or 2, the water company may have peaceable possession of the entry in order that it may farm it in order to obtain the patent for the entryman and perfect its lien as against the world.
5. He will pay his water bills.

We have leased the laterals to them, but we have only sold him the *use* of the main system. In a hypothetical case where the contract would be paid in cash, the Water Company would have a profit of $59,648 per entry since it would still own the water *system* . . . (Ex. G-150, Doc. A-15).

It must be emphasized that the comments are Mr. Miller's and reflect only his understanding, for there was no evidence that any of the entrymen had seen or knew of the existence of this memorandum.

The water contracts were executed early in August 1963 by the 12 entrymen and the Sailor Creek Water Company. Under the contract, the entrymen were obligated to pay a down payment of $5,200 for a 320-acre entry. The payment was to be due when the entries were allowed (Ex. G-130, p. 4). The rent for the land was sufficient to permit the entrymen to pay the annual water contracts and provide them with cash to pay their income taxes on the reduction in principal.

Although primarily the form of the water right contracts and mortgages was a result of negotiations, discussions and examinations by G. Patrick Morris, Allen T. Noble (acting for the entrymen), and Mr. B. G. Miller (as representative of the water company), the entrymen had given their consideration to the terms of the water contract and the terms of the morgage (Tr. Vol. 12, p. 182 — Roths; Tr. Vol 14, p. 2130 — Baltzors; Tr. Vol. 33, p. 4957 — Axelsen; Tr. Vol. 8, pp. 1262-1263 — Morrises).

Immediately after the Bureau of Land Management granted permission on September 11, 1963, the Sailor Creek Water Company began construction of the penstock pump bases and part of the pipeline of the irrigation system (Ex. G-80, File 4, Doc. 101; Tr. Vol. 19, p. 2936).

III. LEASING THE ENTRIES

Most of the entrymen had intended from the outset to have the land in their respective entries farmed by a tenant or tenants (Tr. Vol 33, p. 5020 — Axelsens; Tr. Vol. 14, p. 2049 — Baltzors; Tr. Vol. 12, p. 1861 Roths; Tr. Vol. 35, p. 5370 Nellie Mae Morris; Tr. Vol 8, p. 1198 Elise Neeley). On September 23, 1963, in furtherance of this intent, all of the entrymen except G. Patrick Morris assigned to Morris and Allen Noble farm leases having a primary term of two years with two five-year renewals at the option of the lessees. The leases provided for annual cash rental of $25 per irrigable acre for two years with option for two additional five-year periods of $22.50 and $30 per acre per year. The leases provided that after the allowance of the entry by the Bureau of Land Management the lessees should have the right to enter the land for the purpose of preparing the land for cultivation and planting crops. It provided that the lessor should pay all *ad valorem* taxes upon the real property and should pay all purchase price and interest payments which have become due under the terms of the water contract. In addition to the cost of preparing the land for cultivation, the lessees agreed to furnish the seed, fertilizer, labor, machinery, farm implements and any other necessary expenses. The lessees had the right to determine the crops to be grown, the soil treatment and fertilization. They further agreed to keep the sprinkler irrigation system owned by the lessors in good condition. The leases were subject to cancellation if the entries were rejected or cancelled by the Bureau of Land Management.

Under the leases, if the lessees failed to take care of the premises as stated, the lessors could hire others to repair any damage due to negligence and charge the cost of repairs to the lessees. The lessors had the right to enter upon the premises to inspect the land and the crops but could not reasonably interfere with the farming operations of the lessees.

And finally, the leases were fully assignable.

In October and December of 1963 Peggy Axelsen gave 99-year leases to two 40-acre tracts within her entry. However, the leases to Morris and Noble were still in effect, so the 99-year leases never became effective and were cancelled in 1967. It was upon the two 40-acre tracts that the company erected permanent farm structures.

In January of 1964 a sublease for one year from Morris and Noble to Sailor Creek Water Company was prepared. This sublease was signed in April 1964 and was for the lands leased to Morris and Noble by the entrymen (Ex. G-80, File 3, Doc. 37). In the fall of 1964 the sublease was superseded by an assignment by Morris and Noble to the company of the 11 leases. At the same time, Morris leased his entry to the company for a one year term with two successive five-year renewal options.

IV. ALLOWANCE, RECLAMATION, CULTIVATION AND FINAL PROOF

The applications for the 12 desert land entries now in issue were allowed by the Bureau of Land Manage-

ment in the period November 1, 1963 through March 13, 1964. Sailor Creek Water Company then began clearing, brushing and leveling the land in each of the entries (Tr. Vol. 19, p. 2940). Construction of the main irrigation system was completed for the most part in late April 1964. It was built to serve one large acreage but could readily be converted to serve individual entries by the addition of water meters. Most of the clearing, brushing and leveling was completed by the end of May 1964 and crops had been planted on the irrigable portions of all 12 entries by June 5, 1964.

With Noble employed as farm manager, the group of entries was set up as one large farm with an overseer's home, farm equipment repair shop, grain bins, large field potato storage building, residence for workers, and an airplane landing strip. The farm was cropped without regard to the boundaries of the individual entries.

On April 15, 1964, the leases were amended because the entrymen had determined not to purchase and install the hand-move laterals. Consequently, the rent was reduced by $1,600 a year or $5 per acre per year. In July 1965, Farm Development Corporation, under a conditional sales contract, sold the laterals back to the entrymen, who in turn leased them back to Farm Development Corporation. Apparently the primary reason for this transaction was the entrymen's understanding that the Bureau of Land Management would not issue patents unless the laterals were owned by them (Ex. G-150-U-11).

On June 8 and 9, 1964, each of the 12 entrymen made final proof before Harley M. McDowell of Idaho Land & Appraisal Service. Mr. McDowell or one of his employees then delivered the final proofs with supporting documents to the BLM Land Office at Boise and made the final payment for each entry. Sailor Creek Water Company then paid Idaho Land & Appraisal Service for the account of each entryman.

On July 7, 1964, the Bureau sent a letter to each entryman requesting copies of the contractual arrangements between them and the developing company. Copies of the lease agreements, amendments and subleases were delivered on July 24, 1964.

On September 4, 1964, the joint venture between Farmland-Idaho, Inc., and Hiller Engineering Corporation was terminated and Farmland-Idaho, Inc., acquired Hiller's interest and assumed Hiller's liability arising from the joint venture (Ex. G-150-R-59). On the same date Farmland-Idaho changed its name to Sailor Creek Water Company (Ex. G-150-R-60). Sometime prior to November 30, 1964, Farm Development Corporation was organized as the parent company for all Hale Brothers Association operations in Idaho with Sailor Creek Water Company as its wholly owned subsidiary (Ex. G-150-W-145).

On September 14, 1964, Morris wrote a letter to Mr. Miller in which he outlined the terms on which he would sell his interest in the leases acquired by himself and Allen T. Noble in the Sailor Creek Project. He proposed to sell 10 percent of his interest for $25,000

cash plus $175 per month for 20 years plus a forgiveness of the existing mortgage amounting to $8,500.

Later, a meeting was held in Boise with Morris, Miller, Noble and Mr. Thoreau, President of Hale Brothers, Inc., to discuss Morris' offer of September 14, 1964. On October 22, Mr. Thoreau wrote down the decisions made at the meeting (Ex. G-337). It was agreed that an assignment of Morris' interest in the leases would be made for one-sixth of the $450,000 anticipated net profit on Sailor Creek in 1964 ($75,000), plus $50,000 for the remaining 11-year term of the leases, plus the forgiveness of advances Morris had by then received totaling $9,300. In accordance with these decisions, a document was executed by Morris and officers of Farmland-Idaho, Inc., in November 1964 whereby Farmland agreed to pay Morris $134,300 and to grant him an option to 300 acres of State land being purchased by Farmland (Ex. G-54).

Primarily, because Allen T. Noble was to be employed as farm manager of the Sailor Creek Project, his arrangement with Farm Development Corporation was entirely different. It was intended that he could leave his money in the venture, risking it for one-sixth of the net crop (Ex. G-246). On October 22, 1964, Noble agreed with Miller and Mr. Thoreau to sign the leases under terms similar in form to those agreed to by Morris. Arrangements were then made to sell Noble 10 percent of Farm Development Corporation (Ex. G-150, Doc. S-92 and D-32; Tr. Vol. 22, pp. 3407-3408, 3431-3434; Vol. 23, pp. 3680-3682). He was also permitted to purchase shares of the Hale Brothers stock with 1500

shares being placed in escrow for him (Tr. Vol. 23, pp. 3681-3682). If the entrymen were aware of the agreements between Morris and Noble and Hale Brothers, they were only generally aware and did not know the details.

Each entryman has made the required payments under his water right contract. The payments were made from the entryman's personal checking account. In each instance, the payment would be made after the entryman had received and deposited to his account the check received from the lessee for rental of the land. The obligation of the entrymen to repay the lessee for the costs of developing the entries, including preparation for cultivation, legal costs, feasibility reports and filing fees, was never clearly defined. Apparently the entrymen understood that when patent was issued there would be a tally of expenses and they then would each be assessed their pro rata share.

It was not until August 1964 that Lyle and Joan Roth each signed memorandum agreements in which they agreed to repay the water company $30 per acre for the expenses of preparation of the land for cultivation. To guarantee payment, the Roths agreed to execute a promissory note and a second lien mortgage. All of the other entrymen (except John E. Morris, then deceased) signed executed similar memorandum agreements on Feburary 17, 1965. These agreements, however, quoted a figure of $23.50 per acre for costs of preparation.

The water company did not set up individual ledger accounts to record each entryman's obligation for ex-

penditures made on his behalf. However, it is evidenced by a memorandum made by Mr. Thoreau, dated December 20, 1964, that it was the intention of the company to charge the entrymen for all other expenses incurred not covered by the memorandum agreement- -"Charge entrymen for all costs to work on land title WERC, legal, etc." (Ex. G-150-W-142). On January 12, 1965, Mr. Thoreau also noted: "Pro ration of all costs- -Beege agrees to keep track." (Ex. G-150-W-44, p. 2). On March 12, 1965, Mr. Miller wrote to Morris about securing patents and allowance of more entries (Ex. G-149, Doc. A-23). The letter reads, in part:

> As we have all known, substantial costs have been incurred for counsel, attorneys, travel and other expenses; and further efforts will require more money. We are happy to advance it, and I certainly think we should finish the fight, because I think we just about have the job done. When it is all washed up, we'll total up the bill and allocate them as fairly as possible.

On April 30, 1965, Mr, Thoreau noted : "Get each one to make an agreement on all expense, secured only by their interest in the land." (Ex. G-149, Doc. A-10).

As of December 31, 1967, the Sailor Creek Water Company or the Farm Development Corporation had paid rent under the land leases aggregating approximately $30,640 on each entry except Peggy M. Axelsen's and Nellie Mae Morris', and these two had received an aggregate of $24,895 each as of December

31, 1967. These are the amounts called for by the various leases as of those dates.

CONCLUSIONS

Following are my conclusions as to the allegations set forth in Paragraph V of each complaint:

I. Allegation (a)

(a) Application for entry was not made in good faith in that (1) the contestee had no intent to reclaim, irrigate, and cultivate the land for his own use and benefit as required by section 1 of the Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. sec. 321, and (2) the contestee, or others acting on his behalf, prepared and filed documents with the land office which concealed and falsified relevant facts and arrangements.

Title 43, section 321 of the United States Code, pertaining to desert land entries, provides:

> It shall be lawful for any citizen . . . upon payment of 25 cents per acre- -to file a declaration . . with . . . the Secretary of the Interior . . . that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter . . . .

In essence, the Contestant has alleged that at the time the applications were submitted each entryman intended to enter the land and obtain patent for the use and benefit of some other person or corporate entity and that in furtherance of this scheme concealed

and falsified facts and arrangements which, if known to the Land Office, would result in the denial of the application.

Contestant argues that G. Patrick Morris and Allen T. Noble selected the entrymen with the end in view that each, because of his close friendship and relationship with Morris and Noble, would be amenable to direction. Contestant also argues that the entrymen selected had no intention to do anything on the land but were willing to sign papers so long as they were not committed to do anything or to expend their own money. In other words, the Contestant alleges that the Contestees are merely dummies who had no desire, ability or means to participate actively in reclaiming and farming their entries and that Morris and Noble, acting on behalf of themselves and the Farm Development Corporation, obtained effective control of the entries.

The facts and the testimony adduced do not support this allegation. First, it is important to note that the allegation is limited by its own wording to matters pertaining directly to the application for entry. For this allegation to be sustained as a basis for cancellation of the entries, it must be shown that the original intent of the entrymen at the time the applications were submitted was to enter the land with no intent to reclaim and with a state of mind evidencing an intent not to act on their own behalf but for others only. The documents alleged to have been falsified are the documents submitted with the applications.

All of the entrymen were called as witnesses and were examined by the Contestant at great length. Each of them reiterated that it was their intention to cause the land to be reclaimed for their own use and benefit. To further this end, the Contestees or entrymen made applications for water rights, entered into lease agreements in contemplation that their land would be farmed jointly with other entrymen, signed mortgage agreements, assignment of water rights, purchase agreements for delivery of water and purchase agreements for water laterals. Admittedly, in these arrangements they relied heavily upon G. Patrick Morris and Allen T. Noble. There was little or no active participation by them in the preparation of the feasibility report and the documents signed by them were prepared by the attorney for the Farm Development Corporation, the entity which ultimately actively reclaimed the land.

What must be borne in mind in any analysis of the actions by the entrymen is that the development of these entries is not possible through individual effort. It is conceded by the Contestees that the construction of an irrigation system sufficient to effectively reclaim the land must be done on a group basis. It would be impossible for an entryman on a 320-acre tract of land to expend the money or obtain financing on an individual basis to conduct water to his entry. An entryman must, therfore, join in a cooperative venture or effort to obtain financing and as a group reclaim sufficient acreage to justify the initial expenditure for the main irrigation system. Certain financial arrangements

must, therefore, be entered into on a collective basis. The desert land law does not prohibit collective or cooperative arrangements by entrymen to develop their entries as a group.

Initially, the Bureau, through its actions, encouraged such arrangements and was fully aware that the entrymen intended not only to obtain 100 percent financing but to lease the land to a single farming entity so that the land could be permanently reclaimed. The Bureau was also aware that the entrymen did not submit individual personal checks for their application for entry fees and that in most instances the entry fees were paid on behalf of the entrymen by their representatives or agents.

Thus the Bureau was aware of all of the facts necessary to make a judgment as to whether compliance was had with the intent and requirements of the law. It knew the entrymen were going to farm the land as a unit and through an agent. The Bureau was aware that the entrymen were going to finance the expenses of reclamation and obtaining water. It knew of the leases from the entrymen to Noble and Morris and it knew of the assignment of the leases from Morris and Noble to the Farm Development Corporation. If there exists other relevant facts and documents which should have been brought to the attention of the Bureau officials, these documents have not been shown to exist. After six weeks of testimony from the entrymen, from officials of Farm Development Corporation and Hale Brothers Association, from officers and employees of Idaho Land & Appraisal Service, and,

more important, after opportunity was given the Contestant to conduct a complete audit of the books of Farm Development Corporation, no evidence was found that documents existed other than those submitted in support of the applications.

It is true that as the work developed and as plans were being formulated that some of the plans were changed. This would be normal and completely understandable as facts and figures were gathered and is not, in and of itself, grounds for suspicion of concealment of relevant facts and arrangements. If, in fact, there were no changes made as the plans were developed, suspicion might be aroused in the normal mind that there was no *bona fide* intention to reclaim the land but merely to file papers unsubstantiated by the facts to induce Bureau officials to allow the applications.

I find, in summary, that the entries were made in good faith and that the entrymen, through their agents, had intent to reclaim, irrigate and cultivate the land for their own use and benefit. I further find that there is no evidence showing that documents filed with the Land Office concealed and falsified any relevant facts or arrangements.

Allegation (a) is dismissed.

II. Allegations (b) and (c)

Allegations (b) and (c) are inextricably related and will be considered jointly.

(b) The contestee entered into arrangements whereby his entry was assigned to and for the benefit of a corporation in violation of section 2 of the Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. sec. 324.

(c) The contestee entered into arrangements whereby others held his entry, together with other desert entry land, in an aggregate of more than 320 acres in violation of section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 329.

Pertinent language of Title 43 U.S.C. § 324 provides:

> No assignment . . . shall be allowed or recognized, except it be to an individual . . . but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

Title 43 U.S.C. § 329 provides:

> . . . but no person or association of persons shall hold by assignment or otherwise prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert lands. . . .

If prohibited assignments were made, it follows that the assignees would hold in excess of 320 acres. Proof of the first constitutes proof of the second. Briefly, the facts are that the entrymen entered into water contracts with Sailor Creek Water Company. The company agreed to construct and operate the main irrigation system for delivery of water and the entrymen agreed to pay the specified sum for the water rights.

Payment for the water rights was secured by a mortgage on the entries.

Except for G. Patrick Morris, all of the entrymen signed to Morris and Noble farm leases having a primary term of two years at an annual cash rental of $25 per irrigable acre. The lessees had renewal options for two additional five-year periods at $27.50 per acre per year for the first five-year option and $30 per acre per year for the second five-year option.

With respect to the occupation and control of the entries, the lease terms are not unusual. The lessees acquired no more privileges than those ordinarily granted to a farm tenant. They obtained the right to farm the land, determine the crops to be grown, the soil treatment and fertilization. They were obligated to pay all costs required for the preparation of the land for cultivation and operation of the farm. They agreed to keep the sprinkling system owned by the lessors in good condition and farm the land in accordance with the usual course of husbandry in the locality.

The lessors agreed to pay all *ad valorem* taxes assessed on the real property and the purchase price due on the water right contracts. The lessors had the right to enter the land and inspect the crops but could not unreasonably interfere with the farming operations. If the land was damaged due to negligence of a lessee, a lessor could hire others to repair the damage and charge the cost to the lessee.

The mortgages, standing alone, do not constitute a prohibitive assignment. The right of an entryman to

mortgage his entry prior to patent either to an individual or to a corporation has been upheld in several decisions. (See *Hafemann v. Gross*, 199 U.S. 342 (1905); *Whitney v. Buckman*, 13 Cal. 536 (1859); *Bashore v. Adolph*, 238 Pac. 534 (Ida. 1925); *Worthington v. Typton*, 173 Pac. 786 (Wyo. 1918). The regulations of the Department of the Interior expressly recognize this right. Section 2521.4 (a) of the code of Federal Regulations (43 CFR 2521.4 (a)) provides:

> A desert-land entryman may, however, mortgage his interest in the entered land if, by the laws of the State in which the land is situated, a mortgage of land is regarded as merely creating a lien thereon and not as a conveyance thereof . . .

It is also recognized that an entryman has the right to hire others to perform the work necessary for reclamation of the entries (*Williams v. Turk (sic)*, 38 L. D. 429 (1910)).

As authority for cancellation of the entries, the Contestant cites the ruling of the Department of the Interior in the case of *United States of America v. Ollie Mae Shearman et al.*, 73 I. D. 386 (1966). In this case it was held that a mortgage to a corporation, coupled with a contract to reclaim under a long term lease which gives the lessee right to possess, reclaim, farm, retain the farming proceeds and pledge the entries, constitutes a prohibitive assignment and holding in excess of 320 acres of desert land. The Solicitor stated:

> If the entrymen gave to Hoodco the right to enter upon the lands and to grow and harvest crops, they transferred to Hoodco, insofar as the limited nature of their estate permitted, an interest in the land which amounted to an assignment. Since Hoodco is a corporation this assignment would not be authorized by law and could not be recognized.

However, the *Shearman* case was appealed to the United States District Court, District of Idaho, Civil No. 1-65-86 and 1-67-97. The Court, in reviewing the record, held, on March 13, 1970, as follows:

> After examining all the evidence presented to the Secretary, it is further evidenced that the Secretary erred as a matter of law in determining the legal effect of a security transaction between the entrymen and Hood Corporation. He erred in holding that the same constituted illegal assignments of the desert entries. The instruments constitute a legal and proper financing plan for the joint development of the entries. It follows that no assignment was made to a corporation and that Hood Corporation did not hold more than the 320 acres of land provided in the desert land law.

The Court did not give in its decision a rationale for its conclusions. However, that decision is the law within that jurisdiction unless overruled on appeal. A notice of appeal has been filed and the decision is not final. But even if the District Court's decision be overruled on the specific issue of whether or not there were prohibited assignments from the entrymen to Hoodco, there are distinctions of fact between that case and the case now before me.

In the *Shearman* case, Mr. Reed and Mr. Michener, who promoted the Indian Hill Project, developed a financial proposal which contemplated that they (Reed and Michener) would try to develop the project with nonrecourse notes, mortgages and leases in which case the entrymen would receive $10 an acre for the land in their entries after patent. These notes, mortgages and leases were not made to an entity having financial capability of developing the entries but were made to the Indian Hill Irrigation Company, which had no real assets.

In the present case, the entrymen, through their agents, dealt directly with the financing corporation and each entryman acknowledged that he would bear his share of the development costs. The leases provide for direct payment of rental to the entrymen with the authorization to withhold part of the rent only if there was a default in the water right contract payments.

The Contestant contends that the entrymen knew nothing of the contractural arrangements they entered into and that each entryman signed instruments without giving it worthwhile evaluation. Actually all the testimony shows is that the entrymen, four years after the fact of entering into the agreements, had no detailed present recollection of the discussions they had concerning these instruments. Further, the only provision for "nonrecourse" in any of the contractual agreements between the individual entrymen and Sailor Creek Water Company or Farm Development Corporation is found in the Waiver of Deficiency clause in the mortgages. The various contractual arrangements

were valid and binding agreements. The water right contracts and mortgages were submitted to the Bureau several days before the mortgages were signed by the entrymen and the entrymen were advised that they would have to sign the contracts before the applications would be considered for allowance.

It was found in the *Shearman* case that the irrigation system was not constructed so that the entries could be farmed as individual units. In the instant case, Mr. Swarner, the Contestant's expert on irrigation systems, while critical of the design of the system at Sailor Creek, concluded that the entries could be irrigated individually by the installation of devices and inauguration of a rotation arrangement between the owners. Keith Andersen evaluated the system from an engineering standpoint (Tr. Vol. 32, p. 4826). Allen Noble evaluated the system from a practical operational viewpoint (Tr. Vol. 20, p. 3044). Thomas Campbell examined the system for the Bureau in connection with the sufficiency of the reclamation of the lands (Ex. G-1, Doc. 78, p. 1). All of these experts concluded that the system is capable of furnishing water for irrigation on an individual basis with a minimal amount of alteration.

Many of the entries involved in the *Shearman* case did not have access roads and there were no rights-of-way for roads, canals and pipelines. In the instant case, the main irrigation system was constructed on a right-of-way granted by the United States of America to Sailor Creek Water Company (Ex. G-80, File No. 4) and all the entries have access roads (Exs. G-105 and G-340).

In the *Shearman* decision the farming entity had the right to discontinue farming and to declare the balance of the notes due and payable within one year after payment. The period of the lease was 20 years. In the present instance, the lease to Sailor Creek Water Company was for two years with two five-year options to renew or a total of 12 years. Sailor Creek cannot discontinue farming until the expiration of the first five-year renewal option and it cannot declare the deferred balance of the water right contracts due and payable unless the water user is in default with respect to his or her obligations under the water right contract.

Finally, it was the finding in the *Shearman* decision that Hoodco Farms offered to purchase each entry after patent for $10 per acre and agreed not to withdraw the offer for a period of six months after patent. It was found that when the entries were made, the entrymen were not acting in good faith but with an intent to evade the provisions of the law. In the present case there have been no such offers to purchase and it has not been shown that the entrymen were acting in bad faith. At the most, it has been shown that there have been discussions between officers of the Farm Development Corporation (FDC) and Noble and Morris about the possibility for purchase of the entries after patent. These offers were never made or discussed with the entrymen. None of the entrymen agreed to sell the land in their entries after patent. Nor does the record contain testimony or documentary evidence which would infer that any entryman had agreed to sell the land in his or her entry after patent.

At this point a vital question must be answered — that is whether the agreements entered into by the entrymen with the Sailor Creek Water Company and the actions of the lessee in performing the work done upon the entries placed the entrymen in such a position that they would have no alternative but to sell to the lessee when patent was obtained. In other words, would the entrymen be in a position to farm the entries individually if they so desired? If, at the expiration of the leases, the entrymen were not in a free bargaining position with respect to any future plans for their entry and thus forced to sell to the FDC, the fact that they entered into no agreement to sell would be meaningless. The entrymen would, in effect, be dummies and pawns of the FDC. The FDC's intent would be the intent of the entrymen.

There is nothing in the evidence to indicate that the entrymen would be forced to sell to the FDC at the expiration of the leases. The fact that the entrymen have acquired a perpetual right to the delivery of a stated quantity of water from the FDC has not been challenged. If the FDC failed to exercise its second renewal option under the leases, the payments of the entrymen cannot be accelerated. The entrymen's obligations under the water rights contract, the conditional sales contract and the memorandum of agreement for preparation of the land for cultivation are fixed. The only elements for negotiation are the costs of legal fees, feasibility reports and other miscellaneous items which cannot be fixed until patents are issued. If necessary, now that a permanent water right is assured, the entrymen can either farm the land as indi-

viduals or seek new tenants. They would not be subject to any unusual risks or obligations as farm landlords or as farm owners than those assumed by their counterparts anywhere.

In 6 Corpus Juris Secundum Assignments, Sec. 2b (1), the following is found (at p. 1048):

> The term (assignment) also imports the transfer of the entire title or interest of the assignor in the subject matter . . . and therefore does not include a mere mortgage or pledge . . . or lease. . . .

The distinction between a lease and an assignment referred to in the last citation is as follows (Sec. 2b (7), at p. 1049):

> An assignment differs from a lease in that by a lease one transfers or grants an interest less than his own, reserving to himself a reversion, while by an assignment the assignor transfers the entire estate and reserves no rent or interest in the property assigned.

It has been held by the Department of the Interior that an assignee of a desert land entry should be entitled to all of the rights of the entryman and that the entry should be treated as an entirety and that no patent can be issued on a partial interest. (See *David B. Dole*, 3 L.D. 214 (1884); *Henry W. Fuss*, 5 L.D. 167 (1886); *Bradbury v. Dickinson*, 14 L.D. 1 (1892); *Snow v. Northey*, 19 L.D. 496 (1894); *Luther J. Prior*, 32 L.D. 608 (1904); *Campbell v. Glover et al.*, 35 L.D. 474 (1907); *Michael H. Fallon*, 36 L.D. 187 (1907).) And that an assignee who takes a desert land entry by

assignment exhausts his right under the desert land law precisely as if he had made the intial entry. (See *Albert A. Bandy*, 41 L.D. 82 (1912).)

If an assignee acquires the entire interest of the original entryman, he exhausts his right under the desert land law. How then can there be an assignment of an entry if some interest in the land or the entry remains in the assignor? The answer must be that unless the entire interest is assigned there is not an assignment of the entry as prohibited by the meaning of Title 43 U.S.C. § 324.

Allegation (b) is dismissed.

Even though there were no assignments made in violation of section 324 of the statute, it may still be argued that an excess of 320 acres was held by the tenant in violation of section 329. The prohibition is against **holding** by **assignment or otherwise.**

There are no cases directly interpreting the meaning of the phrase **hold by assignment or otherwise** as used in the statute; nor does the statute state what kind of **holding** it prohibits.

The following general statement of the primary meaning of the word "hold" as it applies to real estate is found in 40 CJS HOLD (at p. 406):

> With reference to real estate, the word "hold" has a well defined meaning; but in seeking its meaning it must be looked at in connection with the context. In its primary significance, it means to enjoy and possess; and includes the two-fold idea of actual possession of the property **and being invested with legal title.** It has to do with the duration or tenure of the

estate rather than with the mode of acquisition; and sometimes is not designed to measure the character of the possession. **The term has been held equivalent to "own."** (Emphasis added.)

This definition cannot be considered as conclusive, however, for the word has many different meanings depending on the circumstances or context of the sentence in which it is used. Rather than looking to a precise definition of the word, one must look to the intent of the statute. This intent was construed in the early case of *Silsbee Town Company*, 34 L.D. 430 (1906). This case was decided prior to enactment of 43 U.S.C. § 324 prohibiting assignments to corporations and involved the primary question of whether the Land Department could make inquiry into the qualifications of individuals composing a corporation to determine whether the corporation was qualifed to make a desert land entry. However, the interpretation given by the Secretary of the Interior to the legislative intent in incorporating the prohibition against the holding by **assignment or otherwise** in section 329 is valid authority today. In the *Silsbee* decision, after quoting this section, the Secretary of the Interior states:

> The language quoted clearly discloses the legislative intent that no person or association of persons shall obtain **the benefit incident to the acquisition of title** to more than 320 acres of land under the desert-land law, and it was not the intention to permit a person to exercise directly, in an individual capacity, the benefit conferred, and in addition, obtain a like benefit, by the indirect exercise of the same right through the instrumentality of a legal fiction. (Emphasis added.)

As section 329 is thus construed, those who obtain benefits incident to the acquisition of title to more than 320 acres are in violation of the statute. However, tenants cannot acquire these rights. The entrymen alone are the persons who have the right to seek title and they have retained other reversionary interests which have not been alienated. The rights of use and occupancy which FDC has are derived not from the United States but from the individual entrymen. The lessee merely holds the land in temporary possession for the lessor and cannot claim the lessor's paramount right of possession for himself.

Allegation (c) is dismissed.

III. Allegation (d)

> (d) The contestee, or others on his behalf, filed proof papers which (1) concealed that the proof taking, the work on the entry land, and the application for entry, were for the benefit of others than the contestee, and (2) failed to show the reclamation, irrigation, and cultivation of the contestee's entry was performed as required by the Act of March 3, 1877 as amended, 19 Stat. 377, 43 U.S.C. secs. 321 through 329.

The Contestant asserts that the Contestees were making false statements because they claimed to be securing water supplies by purchase when in fact they had not made the down payment and their water

rights contracts were in default. However, under general contract law, there was no default. If Contestant's theory is sustained, it would have to be on the basis that a default is equivalent of a forfeiture of the water rights. Here, water had been delivered to each entry before final proof was made and, under Idaho law, if water has been delivered the right to the water becomes appurtenant to that land. If, in fact, there was a default, the water company's only remedy would be to sue on the debt and foreclose its mortgage. Any foreclosure would be subject to redemption within one year following the sheriff's sale. What happened in the present case is that the parties deferred the down payments by oral agreement and, while the Contestant argues that the entrymen had no obligation or intention of obtaining either a down payment or the annual installments, this assertion is not borne out by the testimony and evidence adduced.

The Contestant's brief (p. 159) also states that at the time of final proof the Contestees and the proof-taking officer concealed from the Bureau the whole scheme to place the land in corporate hands, including the fact that the lands had been leased for 12 years to a corporation and that the corporation had done all the work and paid all the expenses to reclaim the land. Contestant claims that the answers given in the final proof papers where framed in such a manner that they presented a picture to the Bureau of 12 entries individually developed and separately farmed; that it cannot be determined that the corporation farming the entries constructed the water system and owned the lateral

lines; that all expenditure for the work done had been made by this same corporation; and, finally, that the corporation had put in force a scheme to transfer the entries to the corporation after patent.

The regulations, 43 CFR 1823.2-1, with respect to the examination of claimants and witnesses under final proof states as follows:

> All final proofs should be reduced to writing by or in the presence of and under the supervision of the officer taking them, and in all cases where no representative of the Government appears for the purpose of making cross-examinations the officer taking the proof should use his utmost endeavor and diligence so to examine the entryman and his witnesses as to obtain full, specific, and unevasive answers to all questions propounded on the blank forms prescribed for the taking of such proofs, and in addition to so doing he should make and reduce to writing and forward to the manager with the proof such other and further rigid cross-examination as may be necessary clearly to develop all pertinent and material facts affecting or showing the validity of the entry, the entryman's compliance with the law, and the credibility of the claimant and his witnesses. And, in addition to this, he should inform the manager of any facts not set out in the testimony which in his judgment cast suspicion upon the good faith of the applicant or the validity of the entry.

Specifically, the Contestant points to the questions under the **Improvements** section of the final proof where dollar amounts were listed for such items as

clearing, breaking and leveling. Contestant states that this is false in two respects: (1) That the reasonable value shown was not the actual value of the work, and (2) that the entrymen did not pay for the work or agree to pay for it. The arguments as to whether an entryman must pay out of his own pocket will be discussed later. However, the Bureau offered no proof that the reasonable value of the work listed in the final proof was not the reasonable value of the work actually done upon the land. The testimony and evidence show only that work far in excess of $3 per acre was performed. If the estimated amounts as stated in the final proof were overestimated or underestimated, it cannot be reasonably inferred that the statements made are fraudulent. It cannot be inferred that fraud was committed when under the heading of **Improvements** no mention was made of who did the clearing or breaking when the feasibility study previously on file with the Idaho Land Office clearly indicated that the land would be farmed by tenants. It is clear to anyone having the entire record before him that, prior to the taking of final proof, the Bureau officials knew what was going on upon the entry, who was farming it, who was making the improvements, and, in general, all of the facts which the Contestant now states were false and fraudulently concealed in the final proof taking. As a point of fact, the answers given by the entrymen in the final proofs were simply the answers called for upon the forms provided by the Bureau. The final proof form, as filled out, does not contemplate that the entryman must prove or testify how the work was done, by whom

it was done, what was paid for the work, how payment was made, or how payment was to be paid.

In his final proof, the entryman has no burden of anticipating what inferences can be drawn from an examination of the entire case file of a desert land entry and rebutting those inferences in advance. In *McKinley Mortgage and Debenture Co.*, 21 L.D. 345 (1895), in connection with a question as to the sufficiency of an answer given on final proof, the Department stated:

> . . . It is true that the answer made by the entrywoman might ordinarily raise a suspicion as to whether she was the head of a family, but I do not think it should in this instance. The blank upon which her final proof is made, furnished by the government, did not contain the direct question as to whether she was the head of a family. The only question bearing upon this subject is quoted above, and the answer thereto is full and unambiguous. . .

In summary, it has not been established that false information was given to anyone in connection with these entries nor were any facts or arrangements concerning these entries concealed from the Bureau. In the case of *Nancy M. Hough*, 47 L.D. 621 (1912), the Department overruled a decision of the Commissioner of the General Land Office which rejected a desert land entrywoman's final proof papers on the grounds that the water supply was insufficient to irrigate the entry and the cultivation did not appear sufficiently remunerative to establish good faith. The Department,

in ruling that such requirements were not imposed by statute nor contemplated by Congress, stated (at p. 623):

> The requirements are fulfilled if at least one-eighth of the land is irrigated and cultivated, and the entryman owns a sufficient water right and has constructed ditches or other conveyances, has brought water to the land, and is prepared to turn water upon the entire tract when it shall have been prepared for cultivation. (Cited cases omitted.)

It has been established that the land in each entry has been completely reclaimed, irrigated and cultivated and the reclamation and cultivation is entirely permanent.

Allegation (d) is dismissed.

IV. Allegations (e) and (f)

(e) The Contestee failed to make the expenditures for the reclamation, irrigation, and cultivation of the entry lands as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 328.

(f) The contestee did not reclaim, irrigate, and cultivate the entry lands as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. secs. 328, 329.

The facts are conclusive that the lands involved in these entries were reclaimed, irrigated and cultivated and that more than $3 per acre was

expended. Further, there is no real question of fact as to who actually performed the work on the ground and as to who initially paid the bills for the work done. It was the lessee or its predecessor. The issues raised by these two allegations are, then, whether the provisions of the statute (43 U.S.C. § 328, 329) have been violated in that the entrymen did not physically perform or initially pay for the reclamation. These two allegations are interrelated and will be considered jointly.

Title 43 U.S.C. § 328, reads, in pertinent part, as follows:

> No land shall be patented to any person . . . unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least $3 per acre of whole tract reclaimed . .

Section 329 states:

> At any time after filing the declaration . . . upon making satisfactory proof to the . . . Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided . . . and upon payment . . . of the additional sum of $1 per acre for said land, a patent shall issue . . .

The position of the Contestees is that the source of the funds is immaterial if each entryman was leg-

ally and unconditionally obligated to pay his share of the work involved in obtaining the allowance of the entry. The position of the Contestant is that the $3 per acre must be expended from the personal funds of the entryman and that personal involvement in the reclamation of the land is required. In support of this argument, the Contestant cites two decisions, *viz.*, *United States v. Shearman, supra,* and *In Re Henderson,* 21 Hawaii 104 (4th Cir. 1912). In finding that the entrymen in the *Shearman* case did not expend the required $3 per acre and did not reclaim the entries, the Secretary quoted and rejected as being distinguishable on the facts the cases of *Conway v. United States,* 95 Fed. 615 (8th Cir. 1899) and *Williams v. Kirk,* 38 L.D. 429 (1910).

In the *Conway* case, the Court concluded, in essence, that it was proper expenditure for a homestead entryman to enter into a contract with another whereby the entry was cleared, cultivated and buildings were built in exchange for the timber on the entry. In the *Williams* decision the Department held:

> The fact that the annual expenditures for the benefit of a desert-land entry are made by another, for the entryman, is not sufficient ground for contest, if made in good faith to effect reclamation, and not with a view to indirectly obtaining title to the land. (Syllabus).

With respect to good faith and personal expenditure, the *Shearman* decision ruled:

> . . . The Department "cannot seek the source of money expended for the purpose of reclamation" "if an entryman causes, *in good faith*, expenditure of the required amount in permanent improvements for the purpose of reclaiming and entering the land." The evidence in this case discloses that the entrymen did not act in good faith, and that Hoodco Farms, not the entrymen, caused the expenditure to be made for the reclamation.

On the basis of the facts, it is the *Shearman* decision rather than the cases of *Conway* and *Williams* which can now be distinguished from the present case. Each of the three decisions stand for the propositions that the entryman must become personally involved, must be personally liable for the expenditures made, and must be in good faith. These essential elements, found lacking in the *Shearman* case, are here present. The entrymen were in good faith in their intent to reclaim the entries for their own use and benefit. Each entryman agreed to pay a specific sum with interest in consideration of the water company constructing facilities for the reclamation of the land. On the basis of those promises, the water company expended several hundred thousand dollars in the construction of an irrigation system by which the lands in these entries were reclaimed. The company agreed to construct the system, operate and maintain it and to deliver water to the land in each entry in perpetuity for a stated amount. The water contracts were presented to and approved by the Bureau as part of the show-

ing as to source of water for the entries. Even prior to signing the memorandum agreements, each entryman was personally liable for his share of the work involved in obtaining the allowance of the entries and the cost of developing his entry. The case of *In Re Henderson* was decided by the Supreme Court of the Territory of Hawaii. It involved the validity of a "cash freehold," a form of public land disposition under the laws of the Territory of Hawaii. Under the terms of the statute, the freeholder was required to (1) pay the balance of the purchase price in equal annual installments, (2) cultivate not less than 25 percent of the premises, and (3) maintain a home from the end of the first year to the end of the third year. He was specifically prohibited from assigning or subletting his interest without approval. It was found that the freeholder had authorized another to cultivate the land. In return, the freeholder received a share of the crops, or $5 per acre per annum. The Court stated that the cultivation requirement was intimately connected with that of assignment and held that cultivation, while not necessarily to be done by the freeholder with his own hands, must be done by him or by his servants or agents for him. The Court held the crops grown must be his crops and not those of another. This construction was based primarily upon the purpose and intent of the statute which was stated to be "the settlement and occupation of agricultural and pastoral land by citizen farmers." The Court then said (at p. 118):

> To this end it is required that the freeholder shall maintain his home upon the land taken up, and that he shall not assign or sublet his interests thereon except with the consent of the commissioner. *To this end also he is expected and required to cultivate the land for it is for that very purpose that he is supposed to have applied for it.* It is with this objective in view that the government offers such lands to (sic) settlers at less than their full value and requires them to make oath that they apply for the land solely for their own use and benefit. (Emphasis added.)

The statute under which *Henderson* was decided is not analagous to the Desert Land Act and the *Henderson* case cannot support the proposition that personal expenditures are required by desert land entrymen. The basic purpose of the two acts are not the same. Under the Hawaiian statute the purpose was "settlement and occupation" of the land. The purpose of Congress in enacting the 1891 amendment to the Desert Land Act was set forth by the Department in the case of *Andrew Clayburg*, 20 L.D. 111 (1895):

> The *prime and ultimate purpose* of Congress in enacting these sections *was to secure*, through a system of irrigation, *the complete reclamation of desert lands*, so that they will produce ordinary agricultural crops; to this end a certain mode or manner of reclamation is required, and a time fixed within which the reclamation shall be completed. The mode or manner prescribed is through a sys-

tematic irrigation, by means of main canals, branch ditches, the purchase of water rights, the aggregate cost of which must be at least three dollars per acre of the whole tract entered. *If the land is reclaimed in the manner prescribed, and within the time allowed, the requisite proofs, expenditures and payments made substantially as the law requires, then the entryman will be entitled to patent for the land covered by his entry.* (Emphasis added.)

Inasmuch as the required expenditures have been made and the land reclaimed, the requirements of the statute have been met. Under the terms of the agreements entered into, the cost of the work done will ultimately be borne by the entrymen. Therefore, the Department cannot inquire into the primary source of the money expended and it is immaterial who performed the work.

Allegations (e) and (f) are dismissed.

ORDER

All of the allegations of Paragraph V of the complaints having been dismissed, the request for cancellation of the entries is denied.

It appearing on the record that full compliance with the Desert Land Act has been made by the entrymen, patents should issue.

/s/ John R. Rampton, Jr.
John R. Rampton, Jr.
Hearing Examiner

APPENDIX B

DECISION OF THE INTERIOR BOARD OF LAND APPEALS UNITED STATES

v.

G. PATRICK MORRIS, ET AL.

19 IBLA 350

Decided *April 7, 1975*

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., dismissing contest complaints against twelve desert land entries and refusing to order their cancellation.

Reversed.

1. Desert Land Entry: Generally

An arrangement by which an entity obtains mortgages on desert land entries and also obtains leases of a possible twelve year duration on the desert land entries, the result of which is the vesting of effective control of the entries in such entity, constitutes a holding within the purview of sec. 7 of the Act of Mar. 3, 1877, *as amended.*

2. Desert Land Entry: Generally — Words and Phrases

"Hold." Any person or entity which has acquired actual possession and the right thereof to more than 320 acres of desert lands "holds" such acreage within the meaning of the prohibition of sec. 7 of the Act of Mar. 3, 1877, *as amended.*

3. Desert Land Entry: Generally — Words and Phrases

"Otherwise." As used in sec. 7 of the Act of Mar. 3, 1877, *as amended*, "no person or association of persons shall hold by assignment of otherwise * * *," "otherwise" is not limited to other means equivalent to assignment but rather embraces all mechanisms whereby control of and benefit from an entry or entries are accumulated and transferred.

4. Desert Land Entry: Generally — Desert Land Entry: Cancellation

Violation of the prohibition against holding an excess of 320 acres constitutes a failure to comply with the requirements of law and such entries are properly canceled.

5. Desert Land Entry: Generally — Desert Land Entry: Cancellation

Estoppel will not lie against the Government where there is no showing that the parties to illegal agreements relied in any way on the statements or acts of Government officials.

APPEARANCES: William F. Ringert, Esq., Anderson, Kaufman, Anderson & Ringert, Boise, Idaho, for appellees; Riley C. Nichols, Esq., Office of the Solicitor, United States Department of the Interior, Boise, Idaho, for appellant.

OPINION BY
ADMINISTRATIVE JUDGE
HENRIQUES

INTERIOR BOARD OF
LAND APPEALS

The Government appeals from the decision of Administrative Law Judge John R. Rampton, Jr., dated January 29, 1971 dismissing contests against twelve desert land entries and refusing to order the cancellation thereof.[1] The contests had been initiated in May of 1966 by the Idaho Land Office Manager, Bureau of Land Management. The contest complaints alleged that:

(a) Application for entry was not made in good faith in that (1) the contestee had no intent to reclaim, irrigate, and cultivate the land for his own use and benefit as required by section 1 of the Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. sec. 321, and (2) the contestee, or others acting on his behalf, prepared and filed documents with the land office which concealed and falsified relevant facts and arrangements.

(b) The contestee entered into arrangements whereby his entry was assigned to and for the benefit of a corporation in violation of section 2 of the act of March 28, 1908, 35 Stat. 52, 43 U.S.C. sec. 324.

[1]The entries involved in this appeal are: C. Patrick Morris, I-013820; Joan E. Roth, I-013905; Elise L. Neeley, I-013906; Lyle D. Roth, I-013907; Vera M. Noble, I-014126; Charlene S. Baltzor, I-014128; George R. Baltzor, I-014129; John E. Morris, I-014130; Juanita M. Morris, I-014249; Nellie Mae Morris, I-014250; Milo Axelsen, I-014251; Peggy Axelsen, I-014252.

(c) The contestee entered into arrangements whereby others held his entry, together with other desert entry land, in an aggregate of more than 320 acres in violation of section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 329.

(d) The contestee, or others on his behalf, filed proof papers which (1) concealed that the proof taking, the work on the entry land, and the application for entry, were for the benefit of others than the contestee, and (2) failed to show the reclamation, irrigation, and cultivation of the contestee's entry was performed as required by the Act of March 3, 1877 as amended, 19 Stat. 377, 43 U.S.C. secs. 321 through 329.

(e) The contestee failed to make the expenditures for the reclamation, irrigation, and cultivation of the entry lands as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 328.

(f) The contestee did not reclaim, irrigate, and cultivate the entry land as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. secs. 328, 329.

Timely answers were filed denying the allegations.

Extensive hearings were held commencing on June 26, 1967, and terminating on August 1, 1968, aggregating 38 days of testimony. Both parties thereupon submitted lengthy and detailed briefs. The Judge in his decision found for the contestees on every allegation in the Government's complaint. Specifically, he found that the entries had been made in good faith (Decision

at 15-18 [hereinafter "Dec."]), the entries had not been assigned to a corporation nor did any individual "hold" more than 320 acres of land (Dec. at 18-26), the proof papers did not conceal relevant facts (Dec. at 26-29) and the entrymen made the necessary expenditures in reclaiming, irrigating and cultivating the lands (Dec. at 29-33). The Government timely filed a notice of appeal.

After careful consideration we have reached the conclusion that the Judge's decision is in error and must be reversed. A lengthy recitation of the factual disputes will not be necessary since the facts upon which our determination is based are not controverted. Our specific area of concern relates to the question of whether Sailor Creek Water Company held in excess of 320 acres of desert land in contravention of sec. 7 of the Act of March 3, 1877 *as amended*, 26 Stat. 1096, 43 U.S.C. § 329 (1970).

Prior to entry each entryman acquired a permit to appropriate the waters of the State of Idaho.[2] All the permits, with one exception, were then assigned to the Sailor Creek Land and Water Company of Nampa, Idaho, in June of 1963.[3] In August of 1963, the Sailor

[2]It should be noted that Milo Axelsen, Peggy Axelsen and Juanita Morris did not acquire a water permit for their lands. A permit for the lands embraced in Milo Axelsen's entry had originally been obtained by John E. Noble, Permit No. 31119. A permit for the lands embraced in Peggy Axelsen's entry had originally been obtained by Lucy M. Noble, Permit No. 31118. Permits for the lands embraced in Juanita Morris' entry had originally been obtained by Keith Taylor, Permit No. 31122, and Della Jane Taylor, Permit No. 31123. All four permits were assigned to Sailor Creek Land and Water Company of Nampa, Idaho, and eventually to the Sailor Creek Water Company of Twin Falls, Idaho (Ex. G—141; G—142; G—80 file 1 at 266-77).

[3]Elise Neely's Permit No. 30983 was not assigned to the Sailor Creek Land and Water Company in June. Rather it was directly assigned to the Sailor Creek Water Company on July 23, 1963 (Ex. G—129).

Creek Land and Water Company assigned all of the permits to the Sailor Creek Water Company of Twin Falls, Idaho. The Sailor Creek Water Company was the result of a joint venture entered into on July 5, 1963, by Hiller Engineering Corporation and Farmland — Idaho, Inc., both of which were subsidiaries of Hale Brothers Associates. Subsequently Farmland-Idaho, Inc., changed its name to Farm Development Corporation [FDC]. In September of 1964 the joint venture was terminated with Hiller Engineering transferring its shares in the Sailor Creek Water Company to FDC (Ex. C-CI, C-CJ). FDC, for reasons of convenience, continued to do business under the name of Sailor Creek Water Company (Prehearing Tr. at 26-27).

On August 7 and 9, 1963, the entrymen entered into Water Rights Contracts with the Sailor Creek Water Company (*See e.g.*, Ex. G-13). In these agreements Sailor Creek Water Company agreed to construct an irrigation system and supply the entrymen with water at the rate of $9.31 per acre foot. The entrymen agreed "to farm and irrigate [their entries] to the fullest extent of the acreage thereof as is consonant with good husbandry and farming practice . . ." (*See e.g.*, Ex. G-13 at 8-fa.) The total purchase price of the water right varied according to the acreage involved in the individual entries. Initial payment was to be made within thirty days of the allowance of the entry, with subsequent annual payments over the succeeding nineteen years.[4]

[4]The total amount varied from $59,648 for 320 acres to $48,464 for 280 acres. (*See generally* Ex. G—149, Doc. O.)

At the same time the entrymen and Sailor Creek Water Company entered into a mortgage of their entries for the sum of the purchase price of the water right, less the initial payment. (*See e.g.*, Ex. A of Ex. G-13 [hereinafter *Mortgage*].) Among the provisions of the agreement was a requirement that the mortgagors (the entrymen) pay all taxes and assessments (*See e.g.*, *Mortgage*, at 2-fa), and authorization for the mortgagee to enter upon and take possession of the entry, and receive all rents which were overdue in the case of any default on the agreement. (*See e.g.*, *Mortgage*, at 3-fa.) Finally, each mortgage contained the following provision:

> That the mortgagee, by accepting this mortgage, agrees that the obligation, obligations or debts secured by this mortgage shall be fully satisfied upon receipt of the proceeds of any sale had for the foreclosure of this mortgage and that such acceptance shall constitute a waiver of rights to any deficiency which may remain after the application of the proceeds of such sale. (*See e.g.*, *Mortgage*, at 4-fa.)

Copies of each of these morgages were filed in the land Office on March 27, 1964.

On September 23, 1963, eleven of the entrymen leased their entries to the twelfth entryman, G. Patrick Morris, and to Allen T. Noble. (*See e.g.*, Ex. G-2, Doc. 34.) Each lease was for a term of two years with the right of two subsequent five year renewals. Section 3 of the lease provided that the lessors (the entrymen) pay all ad valorem taxes assessed upon the real property and comply with all of the terms, including

payment, of the Water Rights Contract. All costs of planting were to be borne by the lessees. Similarly, the lessees exercised total control over the selection, growing and harvesting of crops. Section 9 of the lease agreement provided, *inter alia*, that:

> [t]he parties specifically agree that the lessees shall have the right to withhold from the annual cash rental payable to the lessor for the then current calendar year an amount equal to the installment of purchase price and interest due and payable from the lessor and spouse to the said Sailor Creek Water Company during such current calendar year under the terms of the aforesaid contract, and the lessees shall deliver any amount so withheld to the said Sailor Creek Water Company to the credit of the lessor and spouse in payment of the then current annual installment of purchase price and interest due from the lessor and spouse to Sailor Creek Water Company under the aforesaid contract, and such delivery shall constitute payment of the applicable annual cash rental to the extent of the amount so delivered. (*See e.g.*, Ex. G-2, Doc. 34 at 6-7.)

Lessees, of course, retained all revenue generated from the farming operations. The lessees were obligated to pay the lessors an annual rental sufficient to cover their required payments under the Water Rights Contract, foreseeable ad valorem taxes, and income taxes on the principal reductions of their outstanding debt to

Sailor Creek Water Company. (See Tr. XXXVIII at 5855; Ex. G-149, Doc. A, A-15 at 6-7).[5]

On January 1, 1964, G. Patrick Morris leased his entry to the Sailor Creek Water Company (G-1, Doc. 33). On the same day, Allen T. Noble and G. Patrick Morris subleased the other entries to the Sailor Creek Water Company. Both the lease and the sublease were for a term of one year commencing January 1, 1964 (G-150, Doc. X, X-9). Noble and Morris were to receive one-third of the net profit derived from the sale of all crops grown and harvested. The Sailor Creek Water Company agreed to make all payments due under the original leases, and assumed all other obligations under the lease terms.[6]

On September 30, 1964, Morris assigned his undivided one-half interest in the other entrymen's leases to the Sailor Creek Water Company for the sum of $134,300, as well as an option to purchase two parcels of land (Ex. G-150, Doc. X, X-5). Simultaneous thereto, as security for payment, Sailor Creek placed in escrow a reassignment of the leases back to Morris. On February 18, 1965, Noble and the Sailor Creek Water Com-

[5]The Administrative Law Judge in his decision, stated that the cash rental was "$25 per irrigable acre for two years with option for two additional five-year periods of $22.50 and $30 per acre per year." (Dec. at 10.) The Judge apparently relied on a memorandum written by B. G. Miller, an officer of Hale Brothers Associates, which discussed a sliding scale of payments for the renewal years. (Ex. G—149, Doc. A, A—15 at 6—7.) That memorandum, however, employed the sum of $27.50 instead of $22.50. In any case, the actual leases specifically provided that the same rent would be paid for renewal years as that required for the original two year terms. (*See e.g.*, Ex. G—2, Doc. 34 at 4.)

[6]Through inadvertence the original sublease agreement embraced Morris' entry on S ½ sec. 8, T. 6 S., R. 9 E., B.M., which had been leased to Sailor Creek Water Company on Sept. 30, 1963. Therefore, on August 14, 1964, the sublease was amended to delete those lands. (Ex. G—150, Doc. X, X—8.) Three days later Morris assigned one-half of the rental owing on his lease to Allen T. Noble (Ex. G—150, Doc. X, X—7.)

pany reduced to writing an agreement made on October 22, 1964, in which Noble assigned to Sailor Creek Water Company his undivided one-half interest in the leases for $134,300 and an option to purchase two parcels of land (Ex. G-150, Doc. R, R-87).

On the same date that Morris assigned his one-half interest in the other entrymen's leases to the Sailor Creek Water Company, he also leased his own entry to the company for a one-year term with the right of two successive five year renewals (Ex. G-150, Doc. X, X-3).

Thus, by 1965 the Sailor Creek Water Company had a mortgage on all the entries, had leases with an eleven year possible life, had absolute authority to determine what would or would not be grown, oversaw all of the planting and harvesting operations, and retained all profits derived from these operations.[7]

[1-3] Section 7 of the Act of March 3, 1877, *as amended*, 26 Stat. 1096, 43 U.S.C. § 329 (1970), provides, in relevant part, that:

> * * * no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert land * * *.

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[7]It should also be noted that on October 4, 1963, Peggy Axelsen entered into a ninety-nine year lease with the Sailor Creek Water Company for the NW ¼ SW ¼ sec. 2, T. 6 S., R. 9 E., B.M. for $25 per year. (Ex. G—12, Doc. 37.) On December 6, 1963, a similar lease was entered into for the SE ¼ SW ¼ sec. 2, T. 6 S., R. 9 E., B.M. (Ex. G—12, Doc. 38). As the Judge in his decision noted "the leases to Morris and Noble were still in effect so the 99-year leases never became effective and were cancelled in 1967." (Dec. at 11.) Cancellation, however, did not occur until after the initiation of contest proceedings.

The operative phrase of this section is "hold by assignment or otherwise." The Government cites the Departmental decision in *United States* v. *Shearman* [Indian Hill], 73 I.D. 386, 426 (1966) and the *Solicitor's Opinion, Idaho Desert Land Entries - Indian Hill Group*, M-36680, 72 I.D. 181 (1965), as support for its contention that appellants' actions have resulted in a violation of the proscriptions of the Act. The Judge ruled that the Sailor Creek Water Company, being in the position of a tenant, had not violated the prohibition of the Act.

There are three separate words the interplay of which must be analyzed to judge the correctness of the decision below: 1) "hold"; 2) "assignment" and 3) "otherwise."

The word "hold" has no fixed definition. Rather, its meaning can only be determined from the context in which it occurs with due regard for the legislative purpose animating its usage. *See United States* v. *Shearman*, *supra* at 427; *Navajo Tribe of Indians* v. *State of Utah*, 12 IBLA 1, 135-36, 80 I.D. 441, 507 (1973).

BLACK'S LAW DICTIONARY (4th ed. 1951) defines "hold" as follows:

> 1. To possess in virtue of a lawful title; * * * common in grants, "to have and to hold," * * *
>
> 2. To be the grantee or tenant of another; to take or have an estate from another. Properly, to have an estate on condition of paying rent, or performing service * * *

Id. at 864

The *Solicitor's Opinion, supra,* discussed the scope of the word "hold" as it appears in the statute and concluded that two elements must be present: (1) actual possession and (2) the right of actual possession. Under the leases involved herein, the Sailor Creek Water Company clearly had a right of actual possession. Indeed, section 1 of the Lease Agreement, relating to the effective commencement of the leasing period, provides a mechanism for "the lessees to enter into possession of said premises and produce the normal crops which the lessees intend to grow on said premises. * * * " (*See e.g.* Ex. G-2, Doc. 34 at 3.) The Sailor Creek Water Company pursuant thereto entered into actual possession and proceeded to grow crops on the lands embraced by the entries.

Appellees, in their briefs to the Administrative Law Judge [*Brief of Contestees and Intervenor*] and to this Board [*Appellees' Answer*], argue at length that the *Solicitor's Opinion, supra,* is unsupported in either the case law or a careful analysis of the purposes and intent of the Desert Land Act. Their reading of the statute would limit the sweep of the word "hold" to ownership and disregard any interpretation which would embrace a leasehold interest.

Appellees contend that there is support for such a construction in the Coal Land Act, March 3, 1873, 17 Stat. 607, 608, 30 U.S.C. §§ 71-74 (1970), in the limitation, under the reclamation laws, of the amount of land assignable — one farm unit (*i.e.,* up to 160 acres) —

prior to final payment of all charges for the land, sec. 13 of the Act of August 13, 1914, 38 Stat. 690, 43 U.S.C. § 443 (1970), in the acreage limitations found in Sec. 3 of the Act of August 9, 1912, 37 Stat. 266, 43 U.S. C. § 544 (1970), and in the judicial and Departmental Interpretations thereof.

We are not persuaded by the statutory comparisons advanced by appellees. Section 4 of the Coal Land Act provides, in relevant part, that:

> The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or *hold* any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or *hold* any other lands under their provisions; * * *

30 U.S.C. § 74 (1970).
(Italics added).

The cases which appellees cited to the Judge below, in reference to the Coal Land Act, *see Brief of Contestees and Intervenor* at 190-93, suffer from two infirmities. First, the cases uniformly involve acquisition or attempted acquisition of title. Thus, the language of the decisions is naturally couched in phrases denoting acquisition. *See e.g., United States* v. *Colorado Anthracite Co.,* 225 U.S. 219 (1912); *United States* v. *Keitel,*

211 U.S. 370, 388 (1908). But it does not follow that acquisition of legal title from the Government was the only thing prohibited by the section.

Secondly, the Coal Land Act was not a settlement Act but one aimed at the development of mineral resources. In contradistinction the Desert Land Act, while obviously envisaging development of desert lands, was designed primarily to provide a mechanism by which Government land could be obtained and settled by American citizens. Thus, the Desert Land Act has a dual focus and even assuming a restrictive interpretation of "hold" under the Coal Land Act it would be improper to apply such a limiting definition to the Desert Land Act merely because such a reading has a validity under an unrelated Act.

The two sections of the reclamation laws are equally inapplicable herein. Section 13 of the Act of August 13, 1914, provides that:

> [n]o person shall hold by assignment more than one farm unit prior to the final payment of all charges for the land held by him subject to the reclamation law, except operation and maintenance charges not then due.

43 U.S.C. § 443 (1970).

Section 3 of the Act of August 9, 1912 provides *inter alia*, that:

> [n]o person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made * * * before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit * * *

43 U.S.C. § 544 (1970).

A number of points must be made as regards these two sections. First, appellees admit that there are no judicial or departmental cases affirmatively construing these two provisions as *not* encompassing leases. *Appellees' Answer* at 185-88. Their argument is based on silence, on failure to act against an alleged "matter of common knowledge within the Department of the Interior that there are numerous instances of single operators leasing and farming areas within federal reclamation projects * * * far in excess of one farm unit." *Appellee's Answer* at 185. Analysis of the concerns animating the limitations, however, shows that failure to proceed against lessees under the above quoted sections of the reclamation laws was the result of factors not present in the desert land laws.

One of the main purposes of the Reclamation act was to break up existing large land holdings and prevent the establishment of future large holdings and thus assure that the benefits of the Act inured to the general public and not to a few wealthy landowners. *See generally Proposed Repayment Contracts – Kings and Kern River Projects*, 68 I.D. 372 (1961). They were both anti-speculative and settlement-oriented in general thrust. The implementation of the Act did not quiet, but rather exacerbated fears that large landowners were becoming the beneficiaries of reclamation activities to the detriment of the general American

populace. The problem which continued to plague the reclamation laws was that of a large landowner, who would merely maintain his excess holdings until the cheaper lands around his holdings had been taken by earlier settlers. These excess lands did not receive water so long as the large landowners held them, but once sold to a qualified applicant the lands would become eligible. Thus, the large landowners struck upon the simple device of retaining excess holdings until the land values had risen, due to the potential availability of water, and then selling the lands. The profits intended by Congress to flow to the individual settlers were, therefore, going instead to large landowners. By a series of amendments from 1912 to 1926 various stratagems were devised to require large landowners to divest themselves of what was seen as excessive land holdings.

The Acts of August 13, 1914, and May 25, 1926, were direct outgrowths of attempts to rectify the situation. *See generally King and Kern River Projects, supra,* at 384-96. The evils of leasing, when perceived at all, were seen in a context of large landowners leasing to tenants. It was not the lessee who was violating the intent of the Act but the subsisting ownership by which the landowner acquired the benefits of the reclamation law. As was noted by a special advisory committee in its report dated April 10, 1924:

> The tenant is not desirable on the Federal irrigation projects, for the reason that these projects were authorized with the home-building idea as the central consideration. It was hoped that those who entered upon the projects would do so with the purpose of making permanent homes for themselves and their families. Under a system of tenantry, the farm merely becomes a long-distance investment, the profits from which, if any, are used to maintain the family in the city or at least at considerable distance from the farm.

S. Doc. 92, 68th Cong., 1st Sess. at 133.

Little, if any, weight can be given the fact that the Department has not historically proceeded against tenants in reclamation lands for violating the "holding" requirement specified in the statute. Enforcement of the reclamation laws has always been directed at assuring that the *benefits* of reclamation inured to those whom Congress sought to aid. Tenants were not seen as reaping such benefits and it is understandable that no actions against them were undertaken.[8]

Appellees also contend that past Departmental and judicial interpretations of the Desert Land Act militate against acceptance of the view that leasing is within the ambit of the proscription against "holding." Great reliance is placed by both appellees and the Administrative Law Judge on *Silsbee Town Company,* 34 L.D. 430 (1906). That case arose prior to the prohibition of corporate entries codified in 43 U.S.C. § 324 (1970) and involved the authority of the Department to go behind the corporate structure of a corporation seeking to make a desert land entry in order to examine the

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[8] In a subsequent submission, received September 19, 1974, appellees cited *Blight's Lessee* V. *Rochester,* 21 U.S. (7 Wheat.) 535 (1822) and *Rector* v. *Gibbon,* 111 U.S. 276 (1884). We have examined those two cases but find them unpersuasive on the issues before us.

individual qualifications of the individuals composing it. In the course of an opinion affirming the authority of the Department to pierce the corporate veil and examine the individual makeup of corporation the decision stated:

> [t]he language quoted [43 U.S.C. § 329] clearly discloses the legislative intent that no person or association of persons shall obtain the benefit *incident to the acquisition of title* to more than 320 acres of land under the desert-land law, and it was not the intention to permit a person to exercise directly, in an individual capacity, the benefit conferred, and in addition, obtain a like benefit, by the indirect exercise of the same right through the instrumentality of a legal fiction * * *. (Italics added.)

Italics is placed on the use of the phrase "acquisition of title." Inasmuch as the *Silsbee* case involved the making of a corporate *entry* it is manifestly logical that the decision is couched in terms denoting ownership. Once again we do not feel it proper to draw a negative inference from the fact that the decision referred only to the acquisition of title in discussing the "holding" proscription.

We stated, *supra*, that "hold" can only be correctly construed by reference to the context in which it appears with due regard for the legislative intent implicit in its utilization. Section 1 of the original Desert Land Act, Act of March 3, 1877, 19 Stat. 377, provided:

> * * * no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres * * *.

While the Act of August 30, 1890, 26 Stat. 391, reduced the amount of land available for individual entry to 320 acres, it had no effect on the essential prohibition. A consistent course of Departmental decisions prior to the enactment of the Act of March 3, 1891, *supra*, had established the principle that the Congressional prohibition against entry in an excess of 640 acres could not be defeated by either an original entry or assignment of an entry.[9] Thus, while the 1891 Act authorized assignments which had theretofore been prohibited, clear Departmental policy had already established limitations on assignments to the maximum authorized amount of one tract of land. *See David B. Dole*, 3 L.D. 214 (1884).

Adoption of appellees' interpretation would thus result in a finding that Congress, in enacting sec. 2 of the Act of March 3, 1891, had simply re-promulgated the prior existing law. Furthermore, if, as appellees contend, "assignment" had a fixed and established meaning as of 1891 (*Brief of Contestees and Intervenor* at

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[9] *See Joab Lawrence*, 2 L.D. 22 (1884); *Peter French*, 5 L.D. 19 (1886). The Department had originally held that desert land entries were assignable, but in 1880 reversed this holding and held that such entries were not assignable. *S. W. Downey*, 2 *Copps* (1882 Ed.) 1381 (April 15, 1880). The Department subsequently held that assignments made in reliance upon the initial erroneous interpretation would be recognized, but only to the extent of one tract of land *i.e.*, 640 acres. *David B. Dole*, 3 L.D. 214, 216 (1884). The Act of March 3, 1891, *supra*, effectively nullified the Department's interpretation of the 1877 Act as prohibiting all assignments. *See Luther J. Prior*, 32 L.D. 608 (1904).

It could, therefore, be argued that the 1891 Act far from expanding a holding prohibition beyond that embraced by "assignment" was merely permitting actions formerly prohibited under the Act of March 3, 1877. Such an analysis ignores the fact that to the extent that the Department had allowed recognition to be given to assignments in the *Dole* case it had specifically held that no more than one tract of land might be taken by such *assignment*. "Assignment" was thus a known quantity and had Congress intended to limit the holding provision to assignments there would have been no necessity to add the phrase "or otherwise."

133-43) it is difficult to see why Congress did not simply state that "no person or association of persons shall hold by assignment prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert land." The only ostensive reason which appellees' advance for the inclusion of the phrase "or otherwise," namely, "other means equivalent to assignment," implicitly rests upon an assumption that enforcement of the prohibition against assignments is limited to only those instances in which entrymen call their transactions "assignments." But the general rule has always been that "courts look beyond mere names and within to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties or from some isolated provision, its legal character and effect * * *." *United States* v. *Shearman, supra* at 426, citing *Arbuckle* v. *Gates,* 95 Va. 802, 30 S.E. 496 (1898).

Finally, we believe that statutory analysis compels the conclusion that more than title transfer is prohibited by sec. 329. The entire proscription is against holding, *prior* to the issuance of patent, an excess of 320 acres. Since legal title remains in the United States until patent, limiting the prohibition to transfer of ownership would make the act an effective nullity. Rather we believe it covers situations involving agreements to transfer title once acquired as well as arrangements which result in the accumulation or transfer of effective control of and benefit from land in excess of statutory restrictions prior to issuance of patent. *See United States* v. *Shearman, supra* at 428.

Turning to "assignment" we note that the Department in the *Indian Hill* case determined that: "[a]ssignment as used in [sec. 329] is, therefore, concluded to mean such interest or partial interest as will result in effective control of and benefit from the entry or entries." 73 I.D. at 428. The Ninth Circuit Court of Appeals in *Reed* v. *Morton,* 480 F.2d 634 (1973), *cert. denied,* 414 U.S. 1064, affirmed the finding that the actions of the entrymen therein constituted prohibited assignments. Heavy emphasis, however, was placed upon the fact that "the entrymen understood * * * that they were transferring their interests to the developers for $10 an acre, and that they did not regard themselves as having any interest in the land after this meeting." *Id.* at 640.

In the instant case the Administrative Law Judge found that:

> None of the entrymen agreed to sell the land in their entries after patent. Nor does the record contain testimony or documentary evidence which would infer that any entryman had agreed to sell the land in his or her entry.

(Dec. at 23.)

Assuming, arguendo, the lack of an agreement to transfer the lands after issuance of patent it is unnecessary for us to decide whether these actions nevertheless effectively constitute an assignment. *But see United States* v. *Alameda P. Law,* 18 IBLA 249, 81 I.D. 794 (1974). The entire phrase is "assignment or *otherwise.*" (Italics added.) Regardless of what ever techni-

cal argument can be mounted over the meaning of "assignment," we believe appellees must run afoul of the more embracing concept embodied in "otherwise."

Appellees argue strongly that the doctrine of *ejusdem generis* should be applied so as to limit the scope of "otherwise" to, "other means equivalent to assignment." *Brief of Contestees and Intervenor* at 200 g. Appellees' analysis suffers from two discrete infirmities.

First, the doctrine of *ejusdem generis* is not applicable. Shortly stated, the rule provides that where words of general import follow words of specific and particular meaning, the general words are not extended to their widest limits but are rather limited in meaning to the general class of the words specifically mentioned. Thus, *ejusdem generis* is merely a narrower construct of the maxim *noscitur a sociis, i.e.*, the meaning of the word may be known from accompanying words. But use of the word "otherwise" in the statute before us negates appellees' contention, since we are not faced with a succession of specific words but merely a single specific word. "Otherwise" by its nature implies a differentiation from words conjoined. *Black's Law Dictionary, supra,* defines "otherwise" as "[i]n a different manner, in another way, or in other ways." *Id.* at 1253. *See e.g. Dunham* v. *Omaha & Council Bluffs St. Ry. Co.*, 106 F.2d 1,3 (2d Cir. 1939); *Newport Air Park, Inc.*, v. *United States*, 293 F. Supp. 809, 811 (D.R.I. 1968). Appellees would invoke a doctrine of construction, of questionable utility in the instant case, to nullify the plain meaning of a simple

word. But a basic tenet of all statutory construction is that words are construed in their ordinary meaning. *Mason* v. *United States*, 260 U.S. 545 (1923). Appellees' interpretation would negate the entire meaning of the word. *See generally Sutherland, Statutory Construction* §§ 47.17-47.22.

Even more importantly the meaning of "otherwise" is largely controlled by the meaning of "hold." Appellees, by adopting a narrow construction of the word "hold," argue that "otherwise" by its nature is circumscribed so as only to cover "means equivalent to assignment." Taking a less restrictive view of the meaning of "hold," however, immediately leads to a definition of "otherwise" which is more inclusive in ambit. We have discussed above the reasons for rejecting the definition of "hold" advanced by appellees, and no purpose would be served by a reiteration of the reasons given for adopting a definition which includes all mechanisms whereby control of and benefit from the entries are accumulated or transferred. Clearly, the structure of control exhibited by the documentary submissions of both parties leads to the inescapable conclusion that Sailor Creek Water Company with the aid of the individual entryman violated the prohibition against holding an excess of 320 acres of desert land prior to the obtaining of patent.

[4] Appellees contend that cancellation of the entries, even assuming a violation, would be improper for two reasons. First, they argue that a violation of the holding requirement is not a proper ground upon which to cancel the entries. *Brief of Contestees and*

Intervenor at 265-74. Section 2 of the Act of March 3, 1891, 43 U.S.C. § 329, provides, in relevant part, that desert land entries:

> * * * shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or *failure to comply with the requirements of law,* and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States. (Italics added.)

Appellees contend that the italicized provision applies only to positive requirements of the law, *e.g.*, cultivation of ⅛th of the entry within four years, but does not reach the negative prohibitions of the holding limitations. Such an interpretation can scarcely be credited, particularly since the Ninth Circuit Court of Appeals in *Reed* v. *Morton, supra,* specifically held that violations of the prohibition against assignments to corporations, also a negative prohibition, warranted cancellation of the entries. We find that a holding in excess of 320 acres is a failure to comply with the requirements of law such as would require cancellation of the entry.

[5] The appellees also contend that the Government should be estopped from invalidating the entries. Their brief to this Board states:

> * * * all the transactions which occurred between the entrymen and the water company or Morris and Noble were presented to the BLM either as part of the applications or as part of the feasibility report or

> in discussions with BLM representatives or as part of the supplemental proof submitted by each entryman. At the times it received the various items of information the BLM was obligated to advise the entrymen that it considered the transactions as constituting assignments which it could not recognize. *Appellees' Answer* at 225.

While their argument is specifically directed at a finding of assignment, it is equally applicable to a violation of the holding requirement "by assignment or otherwise." Initially, it should be noted that the Government, as a general rule, is not estopped to attack illegality. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389 (1917); *Reed* v. *Morton, supra,* at 643 (1973). The situations which estoppel will lie against the Government have been strictly circumscribed by various court decisions. (*See e.g., Brandt* v. *Hickel,* 427 F.2d 53 (9th Cir. 1970); *United States* v. *Lazy FC Ranch,* 481 F.2d 985 (9th Cir. 1973). In *Marathon Oil Co.,* 16 IBLA 298, 81 I.D. 447 (1974), this Board examined at some length the parameters within which the exception to the general rule is operative. Therein, we stated that an exception is recognized where: "(1) the erroneous advice is in the form of a crucial misstatement in an official decision; (2) the result of the misstatement violates standards of fundamental fairness; and (3) the public's interest is not unduly damaged by the imposition of the estoppel." *Id.* at 316, 81 I.D. at 455.

Appellees' contentions are clearly insufficient to invoke estoppel under the criteria set out above. They

point to no "crucial misstatement in an official decision." Rather, they argue that they relied upon a failure of Governmental employees to inform them of the illegality of their actions. One could scarcely expect the Government to caution parties against illegal acts when such acts are not brought to the Government's attention until after their consummation. The illegal act involved herein was the result of the totality of the arrangements entered into between the entrymen and Sailor Creek Water Company. The Government was not informed of the terms of the lease agreement until after it made a specific request for the information (*See e.g.*, Ex. G-2, Doc. 33). The leases had, in fact, been entered into the previous year, and had already been subleased for a one year term to Sailor Creek Water Company. Having failed to inform the Government of the totality of their arrangements, appellees cannot be heard to argue that the Government's failure to warn them of their illegality supports the invocation of estoppel. Having examined the record before us, we find no alternative but to order the rejection of the final proofs tendered and cancellation of the entries.

As this holding is dispositive of the case, we find it unnecessary to rule on the other holdings in the decision of the Administrative Law Judge, or on the merits of the arguments of appellants thereon. This decision accords with our holdings in *United States* v. *Golden Grigg*, 19 IBLA 379, 82 I.D. 123 (1975), decided this date.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the

Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed, the final proofs are rejected and the case files are remanded for cancellation of the entries.

Douglas E. Henriques,
Administrative Judge.

We concur:

Edward W. Stuebing,
Administrative Judge.

Martin Ritvo,
Administrative Judge.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

G. PATRICK MORRIS, et al., *Plaintiffs,*	)
	) Civil No.
vs.	) 1-75-74
	) FINDINGS,
UNITED STATES OF AMERICA, et al.,	) CONCLU-) SIONS AND
Defendants.	) ORDER

Reporter's Transcript of proceedings held December 10, 1976, at Boise, Idaho, before the HONORABLE J. BLAINE ANDERSON, United States Circuit Court Judge, Ninth Circuit, sitting by designation.

FRIDAY, DECEMBER 10, 1976
BOISE, IDAHO

THE COURT: This matter has been under submission since last August, I believe, and I called for reargument on these points and now I think the time has come for a decision and as the old saying goes, the buck stops right here for now and now a decision is in order so that this matter can move on.

I hope my study over the last five or six months or more leads to a correct conclusion and, if not, it can be tested in the Court of Appeals.

The Reporter will prepare a transcript and it will be entitled Findings, Conclusions and Order in the appropriate place and I will so indicate to you where you can close it with my signature. A copy is to be served on counsel.

First, I am going to give, for the benefit of the record, a little recital of not the facts, but the background.

In May, 1966, the Idaho Land Office Manager of the Bureau of Land Management initiated contests against the desert land entries of the plaintiffs. Extensive hearings before Administrative Law Judge John L. Rampton were commenced on June 26, 1967, and terminated on August 1, 1968, constituting 38 days of testimony and evidence. The Administrative Law Judge issued his decision on January 29, 1971, and dismissed the contest complaints against the twelve desert land entries. The government appealed that decision to the Interior Board of Land Appeals. The IBLA on April 7, 1975, reversed the Administrative Law Judge's decision, holding that the entrymen's lessee, Sailor Creek Water Company, held in excess of 320 acres in violation of 43 U.S.C. § 329 and ordered cancellation of the entries. The plaintiffs filed the present action on May 16, 1975, seeking judicial review of the IBLA's decision. This action is presently before the court on cross motions for summary judgment. The Court expressly finds that it has jurisdiction, there being no contest with respect to that.

I adopt the factual findings of the Administrative Law Judge, John L. Rampton, for the purpose of this decision. I refer to his Findings of Fact as to the entry, the things done with respect to perfecting it. The cultivation of the land and the various leases, the contracts, the mortgages and I adopt those, the legal effect of those. I think he correctly found the facts based upon the evidence.

The Bureau of Land Management allowed the 12 desert land entries in issue at various times during the period of November 1, 1963, through March 13, 1964. The main irrigation system was completed for the most part in late April, 1964. It was built primarily to serve one large acreage, but could readily be converted to serve individual entries by the addition of water meters. Most of the clearing, brushing and leveling was completed by the end of May, 1964, and crops had been planted on the irrigable portions of all 12 entries by June 5, 1964. The group of entries were set up as one large farm with an overseer's home, farm equipment, repair shop, grain bins, potato storage building, workers' residence, and an airplance landing strip. The farm was cropped without regard to the boundaries of the individual entries.

On June 8 and 9, 1964, each of the 12 entrymen made final proof before Harley M. McDowell of the Idaho Land Appraisal Service. Mr. McDowell or one of his employees then delivered the final proofs with supporting documents to the Bureau of Land Management Office at Boise and made the final payment for each entry. Sailor Creek Water Company then paid Idaho Land Appraisal Service for the account of each entryman. On July 7, 1964, the Bureau sent a letter to each entryman requesting copies of the contractual arrangements between them and the developing company. Copies of the lease agreements, amendments and subleases were delivered on July 24, 1964. Almost twenty-two months later on May 13, 1966, the government filed complaints seeking to contest each of the entries.

THE INTERIOR BOARD OF LAND APPEALS DECISION

The IBLA, in reversing the Administrative Law Judge's decision, focused its attention on one issue: Whether Sailor Creek Water Company held in excess of 320 acres of desert land in contravention of Section 7 of the Act of March 3, 1877, as amended, 26 Stat. 1096, 43 U.S.C. § 329 (1970). In holding that Sailor Creek Water Company did hold in excess of 320 acres, the IBLA first relied upon the analysis made in *U.S. v. Ollie Mae Shearman*, 73 I.D. 386 (1966), which held that an assignment means such interest as results in effective control of the benefits from the entries. The IBLA then relied on the *Solicitor's Opinion*, M-36680, *Idaho Desert Land Entries-Indian Hill Group*, 72 I.D. 156 (1965), which concluded that "hold" has two elements: (1) actual possession, and (2) the right of actual possession.The IBLA found that by virtue of the leases from the entrymen to Sailor Creek Water Company, the latter enjoyed both elements and, therefore, did hold in excess of 320 acres.

The IBLA further held, relying upon *Reed v. Morton*, 480 F. 2d 634 (9th Cir. 1973), cert. was later denied, that a violation of the holding requirement warrants cancellation of the entries. And, finally, that the government was not estopped from invalidating the entries now in issue.

The scope of review of an Interior Board of Land Appeals decision by this Court is to determine if the decision is arbitrary or capricious or unsupported by substantial evidence, considering the record as a

whole. *Multiple Use, Inc., v. Morton*,504 F. 2d 448 (9th Cir. 1974). The interpretation and analysis undertaken by the IBLA is supported by substantial evidence and I find it is neither arbitrary nor capricious. The question presented is one of interpretation of statutory language and, while certainly there are conflicting interpretations, the decision of the IBLA cannot be said to be without any rational basis. Additionally, in light of the Supreme Court's admonition ". . . that courts give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute,"*Investment Company Institute v. Camp*, 401 U.S. 617, (1971), the IBLA's decision that Sailor Creek Water Company held in excess of 320 acres must be affirmed.

The obvious purpose of the holding restrictions was to limit the amount of land that one individual or entity could develop in order to allow as many individuals as possible to apply for and enter the desert lands. This limitation prohibits the use of "dummy" entrymen and to prevent speculative large holdings by a few individuals. The interpretation advanced by the entrymen would allow just such a result. One individual or entity could enlist the aid of numerous entrymen to apply for the entry to the lands. This individual could then lease each of the entries from the entrymen and assume full control of the lands. The entrymen, as lessors, would retain ownership, but the lessee would have the benefits of vast acres of desert land. While it is true that the individual entrymen would receive benefits in the form of rent, the major benefit would

accrue to the lessee. Using this method, the one person could effectively tie up all remaining desert lands, a result clearly not envisioned by the drafters of the Act.

The counter argument of the entrymen is that it is too expensive for one individual to construct large irrigation systems necessary to develop the lands. This is a legitimate concern for the small landowner desirous of developing his own entry. However, there are other methods of achieving the construction of large irrigation systems without doing violence to the intent of the Act, as found by the IBLA. The Act does not prohibit joint financing of an irrigation project, the focus of the prohibition is to limit the number of acres that one individual controls. Arrangements could be made and even mortgages given that would allow for the joint financing of an irrigation system, but still retain control over the entry in the individual entryman.

The conclusion that the IBLA's interpretation of the holding provision, 43 U.S.C. § 329, is not arbitrary or capricious and must be affirmed, however it does not prevent further inquiry by this Court. The IBLA also held that a violation of the "new" holding requirement warrants cancellation of the entries. This court is of the opinion that under the facts of this case, cancellation of the entries is not required and constitutes an abuse of discretion as applied to the facts in this case. The IBLA relied upon *Reed v. Morton*,to hold that the cancellation was warranted. In *Reed* the court appears to have focused almost entirely on the fraud and secrecy of the transactions involved in that case in declaring that the entries therein must be cancelled. The court stated: 480 F2d at 642

> But secret 'arrangements' and 'understandings,' like more formal contracts to pass title to desert land grants after patent, undermine the Interior Department's power and du[illegible] to enforce the restrictions on the recipients of the government's bounty. . . In the present case there was an understanding that title to the lands would pass after patent," (there is no such situation here) "and that understanding was not revealed by the claimants. Because 'the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of the facts which, had they been disclosed, would have rendered the acquisition impossible,' the patents and entries must be canceled. United States v. Keitel, 211 U.S. at 395.

In the case presently before this court, there was no fraud or secrecy in the transactions of the entrymen. The administrative Law Judge, who heard the 38 days of testimony, specifically found:

> "Initially, the Bureau, through its actions, encouraged such arrangements and was fully aware that the entrymen intended not only to obtain 100 percent financing but to lease the land to a single farming entity so that the land could be permanently reclaimed. The Bureau was also aware that the entrymen did not submit individual personal checks for their application for entry fees and that in most instances the entry fees were paid on behalf of the entrymen by their representatives or agents."

> "Thus the Bureau was aware of all of the facts necessary to make a judgment as to whether compli-

ance was had with the intent and requirements of the law. It knew the entrymen were going to farm the land as a unit and through an agent. The Bureau was aware that the entrymen were going to finance the expenses of reclamation and obtaining water. It knew of the leases from the entrymen to Noble and Morris and it knew of the assignment of the leases from Morris and Noble to the Farm Development Corporation. If there exists other relevant facts and documents which should have been brought to the attention of the Bureau officials, these documents have not been shown to exist. After six weeks of testimony from the entrymen, from officials of Farm Development Corporation and Half (sic) Brothers Association, from officers and employees of Idaho Land & Appraisal Service, and, more important, after opportunity was given the Contestant to conduct a complete audit of the books of Farm Development Corporation, no evidence was found that documents existed other than those submitted in support of the applications . . .

"I find, in summary, that the entries were made in good faith and that the entrymen, through their agents, had intent to reclaim, irrigate and cultivate the land for their own use and benefit. I further find that there is no evidence showing that documents filed with the Land Office concealed and falsified any relevant facts or arrangements."

Those appear at Pages 17 and 18 of Mr. Rampton's decision.

Thus, with no finding of fraud or secrecy, it is my belief that the *Reed* case loses its vitality.

More properly, the above factual finding provides a basis to employ the Bureau's decisional policy as expressed in *Freeman v. Laxson*, 48 L.D. 519 (1922) and other cases cited by Mr. Ringert in various briefs filed with this court. In *Freeman*, Dora Laxson made a desert land entry on July 30, 1901. Final proof was submitted October 30, 1902, which was accepted as satisfactory, but final certificate was withheld because the land was at that time unsurveyed. The plat of survey was filed at the time the opinion was rendered. On May 9, 1921, James R. Freeman filed a contest against the entry alleging, among other things, that on October 30, 1902, the entrywoman conveyed her interest to T. B. Craver; that T. B. Craver was not qualified to take an assignment because he had exhausted his 320-acre entitlement; that T. B. Craver was deceased and his heirs were likewise disqualified; that ever since the execution of such conveyance, the entrywoman has abandoned the land.

The Administrative Law Judge in *Freeman*, in discussing the rules governing assignment, stated:

"The regulations governing the assignment of desert land entries contemplate that such assignments will be submitted to the General Land Office for adjudication as to the qualifications of the assignee and for recognition of the assignment. When this plan is pursued and it is found that the assignment cannot be recognized on account of the disqualification of the assignee, the assignment is disallowed

and the title is considered as retained in the assignor. But where parties fail to submit the assignment to the General Land Office, they act at their own risk and if the fact of assignment is brought to the attention of the Land Department by contest alleging disqualification of the assignee, such charge constitutes sufficient ground for a contest and for cancellation of the entry if proven or in the case of failure to make answer."

That appears at 48 L.D. at Page 520.

It is my understanding from the briefs of counsel that *Freeman v. Laxson* was carried forward even into the 1975 edition of the Code of Federal Regulations in this area.

As applied to the present case, the entrymen submitted their leases to the Bureau upon request. Additionally, the Administrative Law Judge, quoted above, found that initially the Bureau was aware that entrymen intended to lease their entries to a single farming entity. Therefore, the Interior Department did not follow its own policy in ordering cancellation, but should have disallowed the "assignments" and permitted the entrymen an opportunity to bring themselves in compliance.

It seems to me cancellation is egregiously harsh under the circumstances of this case. As noted, *Reed v. Morton* is significantly distinguishable. The result dictated by the IBLA here works an unconscionable forfeiture in favor of the government of huge private expenditures, with substantially increased land values

and without any opportunity provided to the entrymen, who were admittedly acting in good faith, to equitably redeem themselves from the change in administrative policy which occurred long after their final proof submissions.

It is my view that plaintiffs were further misled to their detriment by the long delay amounting to approximately 22 months or two crop seasons, if you want to put it that way, of the Bureau in initiating the proceedings. I recognize that during that period of time, much was going on within the Department of Interior. The fact remains the entrymen here were afforded no opportunity in this connection.

I have mentioned to you gentlemen the facet that I think does bear some examination in this connection. I do not rely upon it, except as corroborative of the record already made.

As I have indicated, I do not think I am required to void my mind of knowledge and experience which I have gained through life and the practice of the law. From about 1950 to 1965 as a lawyer, I personally attended scores and scores of desert land entries from their initiation to final proof. During this period of time, I became personally acquainted with the Bureau's personnel, including the inspector, Mr. Curtis Taylor, Mr. Penney and Mr. Orval Hadley, the manager, during these proceedings and others. I also became familiar with the procedure and policy as administered in Idaho with respect to desert land entries. During this period of time it was common practice and it was common knowledge among people who were

knowledgeable in this field of desert land entries, by that I mean lawyers, entrymen, farmers and others, it was wholly acceptable to the Bureau for entrymen to enter into development leases embracing one or more entries, giving to the lessee significant control over the entries during the lease and development period. It was common knowledge and practice. It was common knowledge and practice and the subject, of course, of Mr. Hadley's testimony in this case and also the Golden Grigg case, and while it is not formally admitted by the government, it is not seriously disputed.

I recognize what I am referring to is different in some respects from this case only because of its magnitude. The general practice of accepting government leases existed.

It seems to me that there was a significant interpretation or policy change sometime in the 22 months of 1965 or 1966, I believe. I think this is somewhat of an adjudicated fact occurring within the knowledge of this court and within its territory of jurisdiction. As I say, I consider it only as corroborative of the former record made in this case by Mr. Rampton. While the government, the Secretary of Interior, is not estopped from adopting any change in policy or interpretation as was done in this case, I think that the peculiar facts of this case warrant a holding that he is estopped from enforcing it and entering an immediate cancellation of these entries.

I also would adopt on the equitable considerations of this decision the eight or nine points made by Mr.

Ringert in his brief, Pages 12 through 14, that is the brief submitted in connection with this hearing.

I also feel very strongly that what has taken place here is a violation of the spirit and intent of 5 U.S. Code, 552, of the Administrative Procedures Act.

The order of the court will be that the decision of the Interior Board of Land Appeals as to the interpretation of 43 U.S. Code, Section 329, is affirmed.

The decision and order of the Interior Board of Land Appeals rejecting the final proofs and remanding for immediate cancellation of the entries (19 IBLA 378) is reversed, and the "assignments" of the entrymen as found in the decision are disallowed as not being to qualified entrymen, based upon *Freeman v. Laxson* and other decisions as cited by Mr. Ringert. The entrymen, plaintiffs herein, are allowed until May 1, 1977, within which to divest themselves of the disqualifying "assignments" and upon satisfactory proof thereof made to this Court, the Bureau of Land Management, Boise, Idaho Land Office, shall issue patents to the plaintiffs for their several and separate desert land entries. For failure to make such satisfactory proof within the time allotted, the entries will be canceled, as directed by the Interior Board of Land Appeals in its decision of April 7, 1975.

Within seven days from this date, plaintiffs' counsel will prepare and submit a proposed judgment carrying this decision into effect. Counsel for the parties shall attempt to agree upon the form and content of the judgment, however, any agreement shall not constitute a waiver of any ground for appellate review.

IT IS SO ORDERED.

Dated this _____ day of December 1976.

J. BLAINE ANDERSON
United States Circuit
Judge
(By Designation)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

G. PATRICK MORRIS, et. al, *Plaintiffs,*	)	
vs.	)	Civil No. 1-75-74
UNITED STATES OF AMERICA, et al,	)	**JUDGMENT**
Defendants.	)	

This case is before the Court on the summary judgment motions of the Plaintiffs and the Defendants. On July 6, 1976, a hearing was held on the motions, and another hearing on certain specified issues was held on December 10, 1976. Counsel for each party was present at both hearings and the Court heard arguments with respect to the motions. Based upon the motions for summary judgment, the briefs, the pleadings, the administrative record and other documents on file, the Court has heretofore entered its Findings of Fact and Conclusions of Law, finding and concluding that the

Court has jurisdiction of the parties and the subject matter and that there are no genuine and material issues of fact remaining for determination, and that the Decision of the Interior Board of Land Appeals, 19 IBLA 350, dated April 7, 1975, which is before the Court for judicial review, should be afirmed in part and should be reversed in part.

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED that the Decision of the Interior Board of Land Appeals is hereby AFFIRMED as to the determination and ruling that the contractual arrangements between the desert land entrymen and Sailor Creek Water Company constituted holdings within the meaning of 43 U.S.C. § 329 and that Sailor Creek Water Company held more than 320 acres of desert entry land contrary to the provisions of 43 U.S.C. § 329, and the Decision of the Interior Board of Land Appeals is hereby REVERSED as to the determination and ruling that the United States of America was not estopped to apply the Board's interpretation of 43 U.S.C. § 329 to these desert land entries under the circumstances of this case and rejecting the final proofs and remanding the desert land entries for cancellation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the totality of the contractual arrangements between the entrymen and Sailor Creek Water Company is regarded as constituting assignments of the entries and those assignments are disallowed as not being to qualified entrymen, based upon the ruling of the Department of the Interior in *Freeman* v. *Laxson*, 48 L.D. 519 (1922), and other deci-

sions of the Department. The Plaintiffs are allowed until May 1, 1977, to divest themselves of the disqualifying assignments as found by the Interior Board of Land Appeals in its decision. The Plaintiffs shall submit to this Court the instruments entered into by them to accomplish divestitures as hereinbefore specified and shall serve copies upon counsel for the Defendants. The Defendants shall have ten (10) days following service of those instruments within which to file with the Clerk of this Court any objections they have to the instruments submitted by the Plaintiffs, following which the Court will notify the parties of its approval or disapproval of the methods and instruments adopted by the Plaintiffs. If the Plaintiffs submit, on or before May 1, 1977, proof of divestiture which is satisfactory to this Court, the Idaho State Office of the Bureau of Land Management at Boise, Idaho, upon service of the Court's order approving the proof submitted by the Plaintiffs, shall issue patents to the entrymen as follows:

Name	Legal Description of Land
Milo Axelsen	T. 6 S., R. 9 E., B.M. Sec. 11, SW¼ Sec. 14, N½NW¼, SW¼NW¼, NW¼SW¼
Peggy M. Axelsen	T. 6 S., R. 9 E., B.M. Sec. 2, NW¼SW¼, S½SW¼ Sec. 11, NW¼

Charlene R. Baltzor	T. 6 S., R. 9 E., B.M. Sec. 10, W½
George R. Baltzor	T. 6 S., R. 9 E., B.M. Sec. 10, E½
G. Patrick Morris	T. 6 S., R. 9 E., B.M. Sec. 8, S½
The heirs and devisees of John E. Morris, deceased.	T. 6 S., R. 9 E., B.M. Sec. 15, N½
Juanita M. Morris	T. 6 S., R. 9 E., B.M. Sec. 3, S½
Nellie Mae Morris	T. 6 S., R. 9 E., B.M. Sec. 3, Lots 2, 3, 4, S½N½
Elise L. Neeley	T. 6 S., R. 9 E., B.M. Sec. 8, E½NE¼ Sec. 9, W½NW¼ Sec. 15, SW¼
Vera M. Baltzor	T. 6 S., R. 9 E., B.M. Sec. 9, S½
Joan E. Roth	T. 6 S., R. 9 E., B.M. Sec. 4, Lots 1, 2, 3, 4, S½N½
Lyle D. Roth	T. 6 S., R. 9 E., B.M. Sec. 4, SE¼ Sec. 9, NE¼

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, if the Plaintiffs shall fail to submit satisfactory proof to this Court that they have divested themselves of the disqualifying assignments on or before May 1, 1977, the desert land entries shall be canceled as directed by the Interior Board of Land Appeals in its Decision of April 7, 1975, and the lands therein and the monies paid therefor shall be forfeited to the United States of America.

Dated this 20th day of December, 1976.

J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

APPENDIX D

OPINION OF THE COURT OF APPEALS AND ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G. PATRICK MORRIS, et al., *Appellees,*	)	
v.	)	No. 77-1914
CECIL D. ANDRUS, Secretary of the Interior of the U.S.A., *Appellant.*	)	
G. PATRICK MORRIS, et al., *Appellants,*	)	
v.	)	No. 77-1948
CECIL D. ANDRUS, Secretary of the Interior of the U.S.A., *Appellee.*	)	OPINION

(Filed November 16, 1978)

Appeal from the United States District Court for the District of Idaho.

Before VAN DUSEN*, WRIGHT and GOODWIN, Circuit Judges.

*The Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

GOODWIN, Circuit Judge:

The appeal and cross-appeal in this case arise out of the Secretary of Interior's decision to cancel twelve desert-land entries upon government land in Idaho following administrative proceedings under 43 U.S.C. § 329.[1]

In early 1963, twelve individuals filed declarations under 43 U.S.C. § 321 et seq. upon contiguous 320-acre parcels of desert land. The twelve entrymen concurrently made lease and contract commitments to Sailor Creek Water Co., their source of financing, under which Sailor Creek would advance the capital necessary to bring water to some 3,789.62 acres of undeveloped land. Sailor Creek advanced the money as loans to the entrymen, who in turn agreed to pay for irrigation water and gave their individual mortgages to secure the future contract payments. Eleven of the entrymen also leased their entries to Morris, the twelfth entryman, who in turn subsequently caused the twelve entries to be leased to Sailor Creek. Sailor Creek thereby became both the mortgagee of the anticipated title and the lessee of the possessory interests in the several tracts of land.

[1] 43 U.S.C. § 329 (as amended):

"* * * [B]ut no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, * * *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under sections 321 to 323, 325 and 327 to 329 of this title shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States."

The effect of the leases and mortgages and other related contracts was clearly a violation of 43 U.S.C. § 324:

"No assignment after March 28, 1908, of an entry made under sections 321 to 323, 325 and 327 to 329 of this title shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said sections of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized * * *."

The Department of Interior challenged the entries after development work had been completed. The administrative law judge held generally in favor of the entrymen. The Interior Board of Land Appeals reversed the administrative law judge and held that because the entries and subsequent arrangements violated § 324, the entries were subject to cancellation under § 329. This action was filed by the entrymen to compel the issuance of the patents.

The district court gave both parties partial relief. The court ordered the Secretary to issue the contested patents upon proof that Sailor Creek had divested itself of all impermissible interests in the entries. Both parties appeal.

The government claims both the power and duty to cancel the entries; and the entrymen claim that their interests had vested and could not be canceled.

The entrymen are wrong. The statute states that "no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than" 320 acres of land, and provides for contesting and cancellation. 43 U.S.C. § 329.

The government's point is more complicated. The government relies both upon the plain language of the statutes and relevant court decisions. *See, e. g., Reed v. Morton,* 480 F. 2d 634 (9th Cir.), *cert. denied,* 414 U.S. 1064, (1973).

The government also relies upon the trial court's specific finding, which is undeniably correct, that the Sailor Creek scheme constituted an assignment within the meaning of § 324, and that the consolidated interests amassed under the contracts and leases constituted a "holding" in excess of 320 acres, in violation of § 329.

Even though the facts in the case at bar are far less egregious than were the secret engagements and understandings in *Reed v. Morton,* supra, the facts as found by the administrative law judge and by the district court clearly permitted the Secretary to cancel the entries. The IBLA was consistent with its earlier decision in *Ollie Mae Shearman,* 73 Interior Dec. 386, 427 (1966), when it rejected arguments virtually parallel to those offered by the entrymen here.

Were it not for the equitable arguments offered in the trial court and renewed here, the trial court undoubtedly would have recognized its limited scope of judicial review and concluded the case upon finding that §§ 324 and 329 had been violated.

This court has noted that the scope of review permitted the federal courts is limited by the Administrative Procedure Act, 5 U.S.C. § 706:

> "* * * The district court and this Court are entitled only to determine if the Secretary's decision is arbitrary or capricious or unsupportable by substantial evidence, considering the record as a whole. * * *
>
> "* * * The courts may not substitute their judgment for that of the administrative agency's expertise in the field * * *." *Multiple Use, Inc. v. Morton,* 504 F.2d 448, 452 (9th Cir. 1974) (citations omitted).

The district court correctly noted that courts "give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute," (*quoting Investment Co. Institute v. Camp,* 401 U.S. 617, 626-27 (1971), and found that the Secretary's cancellation of the entries was statutorily authorized.

It was nonetheless held that cancellation of the entries some two years after the irrigation works had been constructed was an abuse of discretion. Despite the mandatory language of § 329, the district court felt that cancellation would be "egregiously harsh under the circumstances of this case," and held the government to be estopped from enforcing its statutory interpretation.

Estoppel may be applied against the government, even when it acts in its sovereign — rather than a merely proprietary — capacity. *United States v. Wharton,* 514 F.2d 406, 410 (9th Cir. 1975). It "is available

as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel," *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973). *See also, United States v. Wharton*, 514 F.2d at 411.

This Court has stated:

* * * * * *

"(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." *United States v. Wharton*, 514 F.2d at 412, *quoting with approval United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970).

However, the IBLA specifically found that:

" * * * The Government was not informed of the terms of the lease agreement until after it made a specific request for the information. (*See, e. g.*, Ex. G-2 Doc. 33). The lease had, in fact, been entered into the previous year, and had already been subleased for a one year term to Sailor Creek Water Company. Having failed to inform the Government of the totality of their arrangements, appellees cannot be heard to argue that the Government's failure to warn them of their illegality supports the invocation of estoppel." *G. Patrick Morris*, 82 Interior Dec. 146, 159 (1975).

Clearly, the first criterion for estoppel has not been met. In its opinion, the district court states that the administrative law judge "found that initially the Bureau was aware that entrymen intended to lease their entries to a single farming entity."

This reference back to the administrative law judge's findings unfortunately ignored the contrary decision of the IBLA, upon which the Secretary acted.

> "* * * [I]n the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs* * *." *Greater Boston Television Corp. v. F. C. C.*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).
>
> "When an agency has authority to substitute judgment for that of a hearing officer, as federal agencies commonly do, the normal system is that the court review the findings and decision of the hearing officer. The Tenth Circuit may have violated the usual system when it directed 'the Secretary to adopt the findings and order of the Hearing Examiner and to vacate that of the Board of Land Appeals'. *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1407 (10th Cir. 1976)." Davis, Administrative Law of the Seventies (Com.Supp.1977) 111.

The court in *Diamond Ring Ranch* found the hearing examiner's finding and order to be "reasonable and

much more in keeping with the underlying facts than was that of the IBLA." *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1407 (10th Cir. 1976). No comparable finding was made by the district court in this case. Since the IBLA has all the powers on appeal of the initial decision which it would have had in making the initial decision itself, 5 U.S.C. § 557(b), its findings — and not those of the administrative law judge — were entitled to recognition in the district court. The equities operating in favor of the entrymen could not be used to invoke estoppel against the government because the first of the four requisites for estoppel — knowledge — was not satisfied.

Had the knowledge requirement been met, estoppel might have had a stronger equitable claim, especially in light of the violation of 5 U.S.C. § 552 by the Department of the Interior in not publishing regulations reflecting its 1966 interpretation of 43 U.S.C. § 329 in the Federal Register. *Cf., Morton v. Ruiz*, 415 U.S. 199 (1974).

We conclude that the district court exceeded its powers when it ordered the Department of the Interior to issue patents to the entrymen, upon divestiture by Sailor Creek of the desert-land entries assigned to the corporation.

Having determined that cancellation of the entries was statutorily justified, the district court had no legal basis for ordering the Secretary to issue patents. In an understandable attempt to do equity, the district court judge overlooked a basic administrative law policy.

> "* * * [W]hen a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course* * *." *N.L.R.B. v. Food Store Employees Union*, 417 U.S. 1, 10 (1974).

Remand was not warranted in this case, however, because the absence of true grounds for estoppel left the court no choice under the statutes and case law but to affirm the Secretary's decision, thus denying relief to the entrymen.

Reversed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G. PATRICK MORRIS, et al., *Appellees,*	)	No. 77-1914
v.	)	
CECIL D. ANDRUS, Secretary of the Interior of the United States of America, *Appellant.*	)	
G. PATRICK MORRIS, et al., *Appellants,*	)	No. 77-1948
v.	)	
CECIL D. ANDRUS, Secretary of the Interior of the United States of America, *Appellee.*	)	ORDER

(Filed April 9, 1979)

Appeal from the United States District Court
for the District of idaho

Before: VAN DUSEN*, WRIGHT, and GOODWIN, Circuit Judges.

On December 7, 1978, G. Patrick Morris et al., appellees in No. 77-1914 and appellants in No. 77-1948, filed

*The Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

their petition for rehearing with suggestion for rehearing en banc. On January 11, 1979, the court filed its order allowing a supplement to the petition to be filed and calling for a response from the government to the new material contained in the supplement; on February 5, 1979, the government filed its memorandum in response.

The opinion filed November 16, 1978, is amended as follows:

The full paragraph beginning at line 25 of the right-hand column of page 3765 of the printed slip opinion (line numbered 19, page 6 of the typewritten opinion) is deleted, and the following paragraph substituted therefor:

> Had the knowledge requirement been met, the entrymen's argument that the Department of Interior violated 5 U.S.C. § 552 by not publishing regulations embodying its interpretation of 43 U.S.C. § 329 might have taken on significance. *Cf. Morton* v. *Ruiz*, 415 U.S. 199 (1974). The analysis of equitable estoppel breaks down, however, with the finding that the government did not know of the assignments until it requested the information that revealed them.

The full court has been advised of the suggestion for rehearing en banc, of the supplement and response, and of the amendment. No judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35.

With the opinion so amended, the petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX E
STATUTORY PROVISIONS, AND REGULATIONS AND INSTRUCTIONS INVOLVED

CONSTITUTION: DUE PROCESS CLAUSE:

The pertinent portion of the Due Process Clause of the United States Constitution — Amendment 5, reads as follows: "No person shall * * * be deprived of * * * property, without due process of law; * * *"

STATUTORY PROVISIONS:

The pertinent statutory provisions are the following:

5 USC § 301 provides:

"The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

5 USC § 552 (a) (1) provides in pertinent part as follows:

"(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —

(D) substantive rules of general applicability

adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

5 USC §§ 554 (a) and (b) provide in pertinent part as follows:

"(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *

"(b) Persons entitled to notice of an agency hearing shall be timely informed of —

* * *

(3) the matters of fact and law asserted."

5 USC §§ 556 (a) and (d) provide in pertinent part as follows:

"(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of

this title to be conducted in accordance with this section.

* * *

"(d)* * * A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. * * *

"(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceding, constitutes the exclusive record for decision in accordance with section 557 of this title * * *"

5 USC §§ 558 (a) and (b) provide as follows:

"(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."

5 USC § 706 (2) provides in pertinent part as follows:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; * * *"

28 USC § 1254 (1) provides as follows:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

28 USC § 1331 (a) provides as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

28 USC § 1361 provides as follows:

"The district courts shall have original jurisdic-

tion of any action in the nature of mandamus to compel an officer or employee of the United States or any agency therof to perform a duty owed to the plaintiff."

43 USC § 2 provides as follows:

"The Commissioner of the General Land-Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

43 USC § 162 provides in pertinent part as follows:

"Any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit* * *that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber

thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, * * *"

43 USC § 263 provides in pertinent part as follows:

"* * * In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt, and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, * * *"

43 USC § 315f provides in pertinent part as follows:

"The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and

amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, * * *

and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, * * *

Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: * * *

The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: * * *"

43 USC § 321 provides in pertinent part as follows:

"It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty five cents per acre — to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter: * * *At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation

of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. Except as provided in section 3 of the Act of June 16, 1955, as amended, no person may make more than one entry under this Act

* * *The aggregate acreage of desert land which may be entered by any one person under this section shall not exceed three hundred and twenty acres.* * *"

43 USC § 324 provides as follows:

"From and after the date of passage of this Act no assignment of an entry made under said Acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said Acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized."

43 USC § 329 provides as follows:

"At any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of

the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act: Provided, however, that additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States."

43 USC § 336 (a) provides in pertinent part as follows:

"* * * any person who holds a homestead or desert land entry which was allowed and subsisting on March 1, 1956, or which,based on an application on file on March 1, 1956, was allowed and subsisting on the date of approval of this Act, is herby granted permission to suspend until March 1, 1959 further operations looking to the cultivation and improvement of the lands: Provided, That such entryman shall forfeit no rights and shall not otherwise be excused from full compliance with the applicable public land laws by reason of such absence or of such suspension of cultivation and improvement opera-

tions: And provided further, That the rights of such entrymen shall not be protected by this Act unless they file with the land office having jurisdiction over the area in which the land is located, (a) a notice of their intention* * * to suspend cultivation and improvement operations and accompanying such notice information as to location and extent of present cultivation or improvement placed on the entry, * * * "

43 USC § 689 provides as follows:

"The Secretary of the Interior is authorized, upon proof being made, to his satisfaction, that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed, to repay to the purchaser, or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated."

43 USC § 1165 provides in pertinent part as follows:

"* * * *Provided*, That after the lapse of two years from the date of the issuance of the receipt of such officer as the Secretary of the Interior may designate upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under the Act of March 3, 1891, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the

delay of two years from the date of said entry before the issuing of a patent therfor."

43 USC § 1201 provides as follows:

"The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for."

Idaho Code § 45-109 provides as follows:

"Lien transfers no title. — Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien."

Idaho Code § 45-901 provides as follows:

"Mortgage defined. — Mortgage is a contract excepting a trust deed or transfer in trust by which specific property is hypothecated for the performance of an act without the necessity of a change of possession."

Idaho Code § 45-903 provides as follows:

"Lien of mortgage is special. — The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession."

REGULATIONS:

The pertinent regulations of the Department of the Interior are the following:

43 CFR § 4.478 (a) (1974) provides as follows:

"(a) *Record as basis of decision; definition of record.* No decision shall be rendered except on consideration of the whole record or such portions thereof as may be cited by any party or by the State Director and as supported by and in accordance with the reliable, probative, and substantial evidence. The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, shall constitute the exclusive record for decision."

43 CFR § 217.39 (1963) provides as follows:

"Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law."

43 CFR § 217.42 (1963) provides in pertinent part as follows:

"Mortgagees are not assignees within the meaning of the repayment laws, but may become such by pursuing the course suited to the particular case as follows:

(a) Where, after date of entry and prior to cancellation thereof, the land is mortgaged and the mortgagee receives a sheriff's deed under foreclosure proceedings, the mortgagee becomes an assignee. (See 193 U.S. 651, * * * 28 L.D. 201, 30 L.D. 136.) * * *"

43 CFR § 232.1 (b) (1963) provides in pertinent part as follows:

"* * * Such reclamation is often a difficult and expensive undertaking, and desert-land entrymen sometimes find serious difficulty in complying with all the requirements of the law, particularly persons who possess little capital. * * *"

43 CFR § 232.9 (a) (1963) provides in pertinent part as follows:

"(a) A person who desires to make entry under the desert-land laws must file with the manager of the proper land office an application, in duplicate, showing that he is a citizen of the United States, or has declared his intention to become such citizen; that he is 21 years of age or over; and that he is a bona fide resident of the State in which the land sought to be entered is located,* * *. He must also state that, when §232.6(a) and (b) do not apply, he has not previously exercised the right of entry under the desert-land laws by filing an allowable application and withdrawing it prior to its allowance or by making an entry or by having taken one by assignment; * * *."

43 CFR § 232.17 (c) (1963) provides in pertinent part as follows:

"(c) No assignments of desert-land entries or parts of entries are conclusive until examined in the land office and found satisfactory and the assignment recognized. When recognized, however, the assignee takes the place of the assignor as effectively as

though he had made the entry, and is subject to any requirement that may be made relative thereto. The assignment of a desert-land entry to one disqualified to acquire title under the desert-land law, and to whom, therefore, recognition of the assignment is refused by the manager, does not of itself render the entry fraudulent, but leaves the right thereto in the assignor. In such connection, however, see 42 L.D. 90 and 48 L.D. 519."

43 CFR §§ 232.18 (a) and (d) (1963) provide in pertinent part as follows:

"(a) After final proof and payment have been made the land may be sold and conveyed to another person without the approval of the Bureau of Land Management, but all such conveyances are nevertheless subject to the superior rights of the United States, and the title so obtained would fall if it should be finally determined that the entry was illegal or that the entryman had failed to comply with the law.

"* * *(d) A desert-land entryman may, however, mortgage his interest in the entered land if, by the laws of the State in which the land is situated, a mortgage of land is regarded as merely creating a lien thereon and not as a conveyance thereof. The purchaser at a sale had for the foreclosure of such mortgage may be recognized as assignee upon furnishing proof of his qualifications to take a desert-land entry by assignment. Transferees, after final proof, mortgagees, or other encumbrancers may file in the proper land office written notice stating the nature of their claims, and they will thereupon be-

come entitled to receive notice of any action taken by the Bureau of Land Management with reference to the entry."

43 CFR § 1822.3-5 (a) (1974) provides as follows:

"(a) Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law."

43 CFR § 1852.1-4 (a) (4) (1964) provides in pertinent part as follows:

"(a) *Contents of complaint.* The complaint shall contain the following information, * * *

(4) A statement in clear and concise language of the facts constituting the grounds of contest."

43 CFR § 2226.1-3 (a) (1964) provides as follows:

"(a) After final proof and payment have been made the land may be sold and conveyed to another person without the approval of the Bureau of Land Management, but all such conveyances are nevertheless subject to the superior rights of the United States, and the title so contained would fall if it should be finally determined that the entry was illegal or that the entryman had failed to comply with the law."

43 CFR § 2521.3 (b) (1974) provides as follows:

"(b) *Qualification of assignees.* (1) The act of March

28, 1908, also provides that no person may take a desert-land entry by assignment unless he is qualified to enter the tract so assigned to him. Therefore, if a person is not at least 21 years of age and, excepting Nevada, a resident citizen of the State wherein the land involved is located; or if he is not a citizen of the United States or a person who has declared his intention to become a citizen thereof; or, if he has made a desert-land entry in his own right and is not entitled under § 2521.1 to make a second or an additional entry, he cannot take such an entry by assignment. The language of the act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment, unless it be done as the exercise of a right of second or additional entry."

43 CFR § 2521.3 (c) (1) (1978 Revision) provides in pertinent part as follows:

"As evidence of the assignment there should be transmitted to the authorized officer the original deed of assignment or a certified copy thereof.* * *"

Regulations, 37 Land Dec. 312, 315-316, §§ 15 and 16 provide in pertinent part as follows:

§ 15. "The language of the act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment. The desert-land right is exhausted either by making an entry or by taking one by assignment."

§ 16. "As stated above, desert-land entries may be assigned in whole or in part, and as evidence of the assignment there should be transmitted to the General Land Office the original deed of assignment or a certified copy thereof.* * *"

APPENDIX F

H. R. NO. 8102 (1886), AND H. R. NO. 7901 (1888)

Section 7 of H. R. 8102, 49th Cong., 1st Sess., 1886, provides as follows:

"Sec. 7. That at any time after filing the declaration, and within the period of three years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns: *Provided, however,* That additional proofs may be required at any time within the period prescribed by law; and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States."

H. R. 7901, 50th Cong., 1st Sess., 1888, provides in pertinent part as follows:

Sec. 14. That any person applying to enter desert land shall first make and subscribe before the proper officer, and file in the proper land office, an affidavit that he or she is the head of a family, or is over twenty-one years of age, is a citizen of the United

States, or has filed his or her declaration of intention to become such, as required by the naturalization laws, and a bona fide resident of the State or Territory in which the land applied for is situated; that such application is honestly and in good faith made for the purpose of reclaiming the same and adapting it to cultivation by irrigation, and not for the benefit of any other person, persons, corporation, or syndicate, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to irrigation, reclamation, and cultivation, necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate, in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the entry or any part thereof; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to reclaim the same and adapt it to cultivation by irrigation for his or her own use; and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure in whole or in part to the benefit of any person, corporation, or syndicate except himself, or herself, and family; and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty but not more than one hundred and sixty acres, and on payment of fifteen dollars when the entry is for

more than one hundred and sixty but not more than two hundred and forty acres, and on payment of twenty dollars when the entry is for more than two hundred and forty acres, he or she shall thereupon be permitted to enter the amount of land specified.

Sec. 15. That at the time of filing the declaration hereinbefore required, the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming the same, and may file a joint map or maps showing their plan of internal improvements.

Section 17. That no land shall be patented to any person under this act unless within three years after making such entry he, or his heirs, shall have, by the necessary irrigation and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, reclaimed and put in actual cultivation one-eighth of the land; but no entry of such desert land by any one person or for the benefit of such person shall hereafter exceed three hundred and twenty acres, nor shall any payment be required therefor, except the payment of twenty-five cents per acre to be paid when the application is filed; but no person shall be permitted to make any such entry unless he is a bona fide resident of the State or Territ-

ory in which such desert land is situated. No patent shall be issued for such land unless within one year after the expiration of the said three years the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry, her heir or devisee in case of her death, proves by two credible witnesses, who are householders, that he, she, or they have actually, by irrigation, raised on at least one-eighth of said land agricultural products of commercial value, and makes affidavit that no part of such land been alienated, except as provided in this act, and that he, she, or they will bear true allegiance to the Government of the United States, then in such cases he, she, or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law.

No. 79-7

In the Supreme Court of the United States

OCTOBER TERM, 1978

G. PATRICK MORRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-7

G. PATRICK MORRIS, ET AL., PETITIONERS

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UNITED STATES OF AMERICA AND CECIL D. ANDRUS
SECRETARY OF THE INTERIOR OF THE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D-1 to D-9), as amended on denial of rehearing (Pet. App. D-10 to D-11), is reported at 593 F. 2d 851. The opinion of the district court (Pet. App. C) is not reported. The decision of the Interior Board of Land Appeals (Pet. App. B) is reported at 19 I.B.L.A. 350.

JURISDICTION

The judgment of the court of appeals was entered November 16, 1978 (Pet. App. D-1). A petition for rehearing was denied on April 9, 1979 (Pet. App. D-10). The petition for a writ of certiorari was filed July 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2 of the Desert Land Act of 1908, 43 U.S.C. 324, provides:

> No assignment after March 28, 1908, of an entry made under sections 321 to 323, 325 and 327 to 329 of this title [43 U.S.C.] shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said sections of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

Section 7 of the Desert Land Act of 1877, 43 U.S.C. 329, provides:

> At any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to such officer of the additional sum of $1 per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to March 3, 1891: *Provided however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under sections 321 to 323, 325 and 327 to 329 of this title [43 U.S.C.] shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid thereof, shall be forfeited to the United States.

QUESTION PRESENTED

Whether the Interior Board of Land Appeals properly concluded that petitioners had unlawfully assigned their entries onto public land in violation of Sections 2 and 7 of the Desert Land Act, 43 U.S.C. 324 and 329, and that therefore such entries should be forfeited.

STATEMENT

In early 1963, petitioner G. Patrick Morris, along with 11 other individuals who were his friends or relatives ("the entrymen"), set out to develop a substantial area of desert land along the Snake River in Idaho. The entrymen obtained water permits from the State of Idaho and then, pursuant to the Desert Land Act, 43 U.S.C. 321 *et seq.*, they filed declarations with the Department of the Interior regarding 12 adjacent 320-acre parcels of previously undeveloped public land. Thereafter, the entrymen assigned the water permits to the Sailor Creek Water Company[1] and also entered into a series of lease, contract and mortgage agreements with Sailor Creek. Under these agreements, Sailor Creek promised to construct an irrigation system for the 12 parcels. The entrymen agreed

---

[1] Hiller Engineering Corporation and Farmland-Idaho, Inc., both subsidiaries of Hale Brothers Associates, founded Sailor Creek as a joint venture in July 1963. Subsequently Hiller Engineering withdrew from the venture and Farmland-Idaho, now called Farm Development Corporation (the corporate petitioner) continued to run the irrigation project under the name Sailor Creek.

to pay for the irrigation project, payment to be secured solely by nonrecourse mortgages on each of the parcels. In addition, 11 of the entrymen leased their land to Morris who, in turn, arranged for Sailor Creek to lease all 12 entries for a total of 11 years. The rental was calculated to cover the entrymen's taxes and payments for the irrigation system. The lease also provided that Sailor Creek exercised total control of the farming operations and that it retained all revenue from those operations. Sailor Creek thus became both the mortgagee and lessee of more than 3700 acres of public land (Pet. App. A-2 to A-15, A-32; B-5 to B-10; D-2).[2]

In 1966, after it became aware of the totality of the arrangements between the entrymen and Sailor Creek, the Bureau of Land Management ("BLM") filed contests against the entries. In particular, BLM alleged that the entrymen had unlawfully assigned their interests to a corporation in violation of 43 U.S.C. 324 and also that the Sailor Creek project, which involved more than 3,700 acres, exceeded the 320-acre limitation set forth in 43 U.S.C. 329.[3] Accordingly, BLM sought cancellation and forfeiture of the entries (Pet. App. A-26; B-26).

Following an evidentiary hearing, the administrative law judge dismissed the complaints (Pet. App. A-21 to A-48). With regard to BLM's claim that the entrymen had unlawfully assigned their parcels to a corporation, the ALJ concluded that the lease-mortgage arrangements did

[2]By 1965, Sailor Creek completed the irrigation project and installed farm equipment. Both the project and the equipment were primarily designed for farming the entire 12 parcels as one farm (Pet. App. A-31; C-3).

[3]In addition BLM asserted that the entrymen had not acted in good faith, had filed false statements, and had not otherwise complied with the Desert Land Act. The administrative law judge dismissed these contentions and they are not before this Court.

not constitute an assignment within the purview of 43 U.S.C. 324. The ALJ further found that petitioners did not exceed the 320-acre limit set by 43 U.S.C. 329 because Sailor Creek, the lessee-mortgage of the 12 parcels, did not absolutely possess all of the rights of the entrymen.

The BLM appealed and the Interior Board of Land Appeals ("IBLA") reversed. The IBLA found (Pet. App. B-10 to B-23) that Sailor Creek's possessory and legal interests under the lease-mortgage agreements in more than 3,700 acres of public land constituted a "hold[ing] [of desert land] by assignment or otherwise" proscribed by Section 329.[4] Moreover, the IBLA rejected petitioners' contention that the government was estopped from seeking forfeiture of the entries even if their arrangements violated the Desert Land Act. Adhering to well established precedent the IBLA held that failure to comply with Section 329 gave rise to a forfeiture and that there was no basis for an estoppel because petitioners did not rely on any official action. The BLM therefore ordered the entries cancelled (Pet. App. B-23 to B-27).

The entrymen then filed suit in the United States District Court for the District of Idaho for review of the IBLA decision. On cross-motions for summary judgment, the district court agreed with the IBLA that the arrangements between the entrymen and the Sailor Creek Water Company were "holdings" prohibited by Section 329. Furthermore, the district court also concluded that the lease-mortgage transactions constituted unlawful assignments within the meaning of Section 324 (C-4 to C-6, C-15). The district court, however, reversed the IBLA's cancellation order, ruling that, in light of the changes and

[4]The IBLA strongly suggested (Pet. App. B-21) that the arrangements also constituted unlawful assignments in violation of Section 324.

delays in implementing Department of the Interior policies, such a remedy would be "egregiously harsh under the circumstances of this case" (Pet. App. C-10). The district court also held that the United States was estopped from applying Interior's interpretation of Section 329 (*id.* at C-12). Instead, the district court ordered the Secretary to issue the contested patents upon proof that Sailor Creek had divested itself of all impermissible interests in the entries (Pet. App. C-13, C-16).

Both sides appealed. The court of appeals also concluded that the lease-mortgage agreements between the entrymen and Sailor Creek violated both Sections 324 and 329, and that the entries were therefore subject to cancellation (Pet. App. D-3 to D-4). The court of appeals, however, reversed the district court, holding that the Department of the Interior was not estopped from enforcing the provisions of the Desert Land Act, even though it did not challenge the entries until the development work was complete. The court observed that there was no basis for estoppel because the government had no knowledge of the terms of the contracts between the entrymen and Sailor Creek until after petitioners had completed their development scheme (*id.* at D-6 to D-8). Accordingly, the court of appeals directed affirmance of the IBLA's decision against the entrymen (*id.* at D-9).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals, and further review of this essentially fact bound case is unwarranted.

1. Petitioners primarily contend (Pet. 18-46) that the lease-mortgage arrangements between the entrymen and Sailor Creek did not constitute a "holding by assignment or otherwise" in violation of Sections 324 and 329. Both

courts below and the IBLA correctly resolved this issue against petitioners. At the outset, we note that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.' " *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). And here, there are "compelling indications" that the Secretary's reasonable interpretation of the statutory language effectuates the congressional intent underlying the Desert Land Act.

The Act was intended to encourage individual farmers to reclaim and farm small parcels of desert land for their own benefit. See *Reed* v. *Morton*, 480 F. 2d 634, 642 (9th Cir.), cert. denied, 414 U.S. 1064 (1973) ("Congress never intended bargain-price desert land to be provided for the benefit of corporations or large landholders"); *Chaplin* v. *United States*, 193 F. 879, 881-882 (9th Cir.), cert. denied, 225 U.S. 705-706 (1912). The original Act, however, did not preclude assignments of entries. Accordingly, speculators, land companies, and cattle barons flagrantly violated the purpose of the Act (and similar land development statutes) by employing dummy entrymen to acquire control of large areas. See, *e.g.*, P. Gates, *History of Public Land Law Development* 638-647 (1968); B. Hibbard, *A History of the Public Land Policies* 424-432 (1939); V. Carstensen, *The Public Lands* 306-307, 315 (1963). Congress responded to these abuses by prohibiting entrymen from assigning their interests to unqualified individuals (*i.e.*, someone who already has taken the maximum 320 acres under the Act) and to corporations. Desert Land Act of 1908, ch. 112, Section 2, 35 Stat. 52. It is apparent that the particular transactions involved in this case run afoul of both the letter and the spirit of Section 324.

Most of the entrymen, who were friends and relatives of petitioner Morris, were essentially dummies: they were unaware of the details of the transactions and their money was not at risk.[5] Furthermore, immediately after filing their declarations of entry, the entrymen transferred their possessory and legal interests in the public lands to an ineligible corporation by means of long term leases and mortgages. Thereafter, Sailor Creek, which had obtained virtually complete control of more than 3,700 acres of public land, set out to cultivate that land as a single farming unit for its own benefit. In short, petitioners unlawfully assigned their entries in violation of Section 324. See *United States* v. *Shearman*, 73 Int. Dec. 386, 428 (1966), aff'd *sub nom. Reed* v. *Morton*, 480 F. 2d 634 (9th Cir.), cert. denied, 414 U.S. 1064 (1973); *United States* v. *Law*, 81 Int. Dec. 794, 797-799 (1974).[6]

Moreover, even assuming that the entrymen did not technically assign their entries, the lower courts and the Secretary were entitled to find that petitioners unlawfully held more than 320 acres of desert land "by assignment *or otherwise*." 43 U.S.C. 329 (emphasis supplied). Congress'

[5]The rental covered their costs such as taxes and the water contract payments. The entrymen were further protected from risk by the nonrecourse nature of the water contracts and mortgages.

[6]Petitioners erroneously suggest (Pet. 43-45) that the Department of the Interior has been inconsistent in its definition and application of the word "assignment." In accordance with its obligation to ensure that Congress' intent is effectuated, the Secretary has always analyzed the substance rather than the form of land transactions affected pursuant to the various Acts providing for patenting of public lands. See, *e.g.*, *Jones* v. *United States*, 258 U.S. 40, 45-48 (1922). And the Secretary has consistently invoked Sections 324 and 329 to contest arrangements such as those at issue here. See *United States* v. *Shearman*, *supra*; *United States* v. *Law*, *supra*. That the Secretary was not faced with assignments essentially identical to those in this case prior to 1966 does not constitute an inconsistent administrative practice.

use of the phrase "or otherwise" plainly indicates that arrangements other than assignments are prohibited by the Act. Here the entrymen conveyed essentially absolute control and possession of the twelve parcels to Sailor Creek for a long period of time. Thereafter, Sailor Creek rather than the entrymen or their agents irrigated and farmed all of the lands for its profit. Given Sailor Creek's possession and appropriation of these lands, the IBLA and the courts below reasonably found that the totality of these particular arrangements constituted a "holding"[7] of excess acreage prohibited by Section 329.[8] See *United States* v. *Law*; *United States* v. *Shearman*, *supra*.[9]

[7]To "hold" land does not require legal title. See, *e.g.*, *Black's Law Dictionary* 864 (rev. 4th ed. 1968); 1 *Bouvier's Law Dictionary* 951 (Rawle rev. 1897); *Navajo Tribe of Indians* v. *State of Utah*, 80 Int. Dec. 441, 507 (1973). Indeed, since title remains in the United States until the patent is issued, petitioners' cramped construction of "hold" would render Section 329 nugatory.

[8]None of the numerous cases cited by petitioners, which involve different statutes and different factual patterns, are in conflict with the instant decision. See Pet. App. B-12 to B-20.

[9]As the district court aptly noted (Pet. App. C-5 to C-6):

> The obvious purpose of the holding restrictions was to limit the amount of land that one individual or entity could develop in order to allow as many individuals as possible to apply for and enter the desert lands. This limitation prohibits the use of "dummy" entrymen and to prevent speculative large holdings by a few individuals. The interpretation advanced by the entrymen would allow just such a result. One individual or entity could enlist the aid of numerous entrymen to apply for the entry to the lands. This individual could then lease each of the entries from the entrymen and assume full control of the lands. The entrymen, as lessors, would retain ownership, but the lessee would have the benefits of vast acres of desert land. While it is true that the individual entrymen would receive benefits in the form of rent, the major benefit would accrue to the lessee. Using this method, the one person could effectively tie up all remaining desert lands, a result clearly not envisioned by the drafters of the Act.

2. Petitioners also contend (Pet. 55-65) that even if their arrangements were illegal, cancellation and forfeiture of the entries was inappropriate. These claims are without merit.

a. Petitioners first suggest (Pet. 55-60) that under the Secretary's own regulations and interpretations an invalid assignment results in voidance of the assignment and not cancellation of the entry. To be sure, where an entryman in good faith submits a proposed assignment to the Secretary for approval and that assignment is determined to be improper, the entryman does not forfeit his claim. See 43 C.F.R. 2521.3(c)(3). Here, however, petitioners never submitted their lease-mortgage agreements for preclearance. The BLM uncovered the totality of petitioners' arrangements after their consummation. Those arrangements ran afoul of both Sections 324 and 329, and Section 329 clearly provides that where the Secretary shows that the entry "fail[ed] to comply with the requirements of law" the entry "shall be cancelled, and the lands, and moneys paid therefore, shall be forfeited to the United States." See *Reed* v. *Morton*, *supra*; Freeman v. *Laxson*, 48 Pub. Lands Dec. 519 (1922).[10]

b. Petitioners further argue (Pet. 60-65) that the government was estopped from enforcing the forfeiture provisions of the Act in this case. It is doubtful whether the government may ever be estopped from enforcing the conditions set by Congress for the alienation of public

[10]Petitioners' reliance on *Freeman* v. *Laxson*, *supra*, is completely misplaced. There, as here, the entryman failed to disclose the assignment and there, as here, the Secretary ordered forfeiture of the entry upon proof of an illegal assignment. "But where parties fail to submit the assignment to the [BLM], they act at their own risk and if the fact of assignment is brought to the attention of the [Interior] Department by contest alleging disqualification of the assignee, such charge constitutes sufficient grounds for a contest and for cancellation of the entry if proven * * *." 48 Pub. Lands Dec. at 520.

property. See, *e.g.*, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-385 (1947); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Goldberg* v. *Weinberger*, 546 F. 2d 477, 480-481 (2d Cir. 1972), cert. denied, 431 U.S. 937 (1977). But, in any event, there is no basis for an estoppel against a private party, much less the government, where, as here, the party to be estopped neither affirmatively misled anyone nor had knowledge of the underlying circumstances. See, *e.g.*, *Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5, 8-9 (1973); *United States* v. *Ruby Co.*, 588 F. 2d 697, 703-705 (9th Cir. 1978). As the IBLA observed (Pet. App. B-26), "[o]ne could scarely expect the Government to caution parties against illegal acts when such acts are not brought to the Government's attention until after their consummation."

c. Nor was the Secretary without power to cancel the entries in the absence of a published rule on this subject. See Pet. 46-55.[11] Rulemaking may be appropriate in those circumstances in which the Secretary seeks to "fill any gap left, implicitly or explicitly, by Congress." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974); see 43 U.S.C. 1201. Here, however, Congress has explicitly provided that entrymen may not assign their interests to corporations and that no one may hold by assignment or otherwise more than 320 acres of desert land. See 43 U.S.C. 324 and 329. The Secretary sought to apply these statutory standards to the facts of an individual case, and in such circumstances, he has broad discretion to proceed by way of ad hoc adjudication rather than by rulemaking. See, *e.g.*, *SEC* v.

[11]We note that in any event the Secretary did have a regulation in effect at the time that petitioners filed their entry declarations (see Pet. 56), and that regulation directed petitioners' attention to *Freeman* v. *Laxson*, *supra*, and the risk of forfeiture involved in clandestine assignments. See note 10, *supra*.

Chenery Corp., 332 U.S. 194, 203 (1947); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974). Indeed, given the myriad of different contractual arrangements that might be used to disguise unlawful assignments and holdings, ad hoc adjudication seems preferable to general rules in this area. See *id.* at 294.[12]

3. Finally, petitioners erroneously claim (Pet. 65-74) that the Secretary's action has somehow deprived them of vested rights. The filing of an application is only the initial step in obtaining title. Prior to patent, the Secretary retains jurisdiction over the public lands and he is required to ensure that the Department's actions accord with the laws governing disposition of public land. See, *e.g.*, *West* v. *Standard oil Co.*, 278 U.S. 200, 210 (1929); *Utah Power & Light Co.* v. *United States*, *supra*. As this Court explained in *Cameron* v. *United States*, 252 U.S. 450, 460 (1920) (quoted with approval in *Best* v. *Humboldt Placer Minning Co.*, 371 U.S. 334, 337 (1963):

> [N]o right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.[13]

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[12]Of course, the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 500 *et seq.*, have no application to adjudicative proceedings such as this one. See, *e.g.*, *Mehta* v. *INS*, 574 F. 2d 701, 705 (2d Cir. 1978).

[13]Even if the Secretary had previously failed to enforce the terms of the Act, but see, *e.g.*, *Freeman* v. *Laxson*, *supra*, he was not precluded from doing so in this case, since "[t]he Secretary can alienate interests in land belonging to the United States only within the limits authorized by law." *Union Oil Co.* v. *Morton*, 521 F. 2d 743, 748 (9th Cir. 1975). Cf. *Baltimore & Ohio R.R.* v. *Jackson*, 353 U.S. 325, 330-331 (1957). Here, of course, petitioners were on notice that their failure to disclose the arrangements to the BLM subjected their entries to forfeiture if those arrangements later proved to be unlawful. See notes 10 and 11, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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